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Women Executives, Managers and Professionals in the Indiana Criminal Justice System

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[T]he system of criminal justice must attract more people and better people—police, prosecutors, judges, defense attorneys, probation and parole officers, and corrections officials with more knowledge, expertise, initiative and integrity.[1]

The experience of the Law Enforcement Assistance Administration has demonstrated that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States.[2]

I. INTRODUCTION

Indiana's Criminal Justice System (ICJS) is in constant need of quality people as employees within its various agencies. The thesis of this Article is that the ICJS should select these quality people from a pool of candidates who are "people" and not just "white men." Women are seeking, and at times demanding,[3] employment within criminal justice systems. To some de-

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[1]PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY vi (1967).

[2]28 C.F.R. § 42.301(a) (1974).

[3]In August 1973 the United States Department of Justice filed a civil suit against the Chicago Police Department to enforce equal employment opportunity regulations. Chicago employs approximately 13,500 police officers,

gree they are being accommodated.[4] The Police Foundation has backed a major study of policewomen on patrol,[5] and women are entering law schools and the legal profession in significantly increasing numbers.[6] However, rarely do women reach executive, professional, or managerial positions within the ICJS.[7] In contrast, more and more women are moving into similar positions in business and industry.[8]

The basic question addressed by this Article is: Do statutory employment requirements, express or implied, discourage or preclude applications by women for or promotion of women to executive, professional, or managerial positions within the Indiana Criminal Justice System? The answer given is necessarily of limited scope. At this initial stage, only one category of factors affecting the entire Indiana Criminal Justice System is considered—Indiana's statutes and their implications as well as issues raised in sex discrimination cases. An examination of informal agency policies and other organizational considerations is left to a later study.

Although this Article is confined to the Indiana Criminal Justice System, that system is not unique and the problems discussed have implications for other criminal justice systems. Within the ICJS are included the state, county, city, and town agents and agencies designated to detect criminal offenses, to apprehend criminal offenders, to prosecute, defend, and adjudicate accused persons, and to "correct" those who are convicted of committing crimes. While this is designated as a singular system, it is recognized that the ICJS is more accurately viewed as a collagenous assembly of town marshals, supreme court justices, state troopers, city judges, attorneys general, and private defense attorneys. As

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of which 115 (0.85 percent) are women. *See* LEAA Newsletter, November 1973, at 24.

[4]Some agencies are actively seeking women for entry level criminal justice positions. *See* Pogrebin, *The Working Woman*, LADIES HOME JOURNAL, September 1973, at 36.

[5]P. BLOCH & D. ANDERSON, POLICEWOMAN ON PATROL (1974).

[6]The 1973 enrollment of women in law school is nine times the 1963 enrollment, 1,883 to 16,760. Women now comprise 15.6% of the total enrollment in approved law schools. Ruud, *That Burgeoning Law School Enrollment is Portia*, 60 A.B.A.J. 182 (1974).

[7]Reference to the Appendix will indicate the very few women in the ICJS. *See also* Ellett, *Monroe Has Only Female Deputy Prosecutor in State*, Bloomington-Bedford Sunday Herald-Times, Dec. 9, 1973, at 2, col. 1; Scutt, *Woman Wields Gavel in Superior Court*, Bloomington-Bedford Sunday Herald-Times, Nov. 26, 1972, at 22, col. 3.

[8]*See generally* Orth & Jacobs, *Women in Management: Pattern for Change*, 49 HARV. BUS. REV. 139 (July-Aug. 1971).

incongruous as such a collage may be, this "system" does have a singular concern—crime and society's public response to it.

To further narrow its scope to a manageable dimension, this Article focuses upon those federal and state laws affecting the ICJS positions of concern. Some of these laws explicitly exclude certain classes of persons; others impliedly include certain classes of persons; others are a combination of these approaches. In any event, this Article is concerned with the legal environment of these ICJS positions. Its conclusions are directed toward changes in the law or changes in practice to more closely comply with present laws. Moreover, the ICJS positions of interest here are professional, managerial, and executive positions. Generally, the authors have defined these positions as those requiring advanced training and education, involving mental rather than manual work, requiring primarily the control or direction of others, or involving the administration of a collection of several functions.[9]

Specifically, this study includes such Indiana law enforcement officials as town marshals, chiefs of police, sheriffs, the state police superintendent, and middle-management positions within larger law enforcement agencies. Also included are county prosecutors and their deputy prosecutors as well as the Indiana Attorney General and those members of his (no woman has ever held the post) staff who deal with criminal prosecutions. Public defenders and private attorneys who handle a significant number of criminal cases are covered as are judges with criminal jurisdiction, such as town, city, and county judges, judges of the court of appeals, and supreme court justices. In the corrections field the study encompasses state institution heads, state division heads and other middle-management positions, local jail supervisors, county probation officers with adult criminal probationers, and state parole officers with adult criminal parolees.

Those ICJS positions not mentioned above are excluded from this study but cannot be ignored. For example, if police chiefs are chosen from the law enforcement agency's lower ranks and agency entrance is possible only at the patrol officer level, then there will be no women police chiefs if there have been no women patrol officers. The study also excludes consideration of such positions as bailiffs, justices of the peace, and prison guards. The various juvenile justice positions are also not covered unless they incorporate criminal justice responsibilities as well.

The next section discusses the general phenomenon of women and employment in 1974. Following is an examination in detail of the specific statutory requirements for employment within the

[9]WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1437, 1095, 639 (2d ed. unabridged 1967).

ICJS. The fourth section examines the discriminatory effect of these specific statutory requirements. The Article closes with a description of the authors' recommended ICJS affirmative action plan.

II. Women and Employment

Criminal justice systems, including the ICJS, are not very different from other institutions in terms of employment policies and practices pertaining to professionals, executives, and managers. Many of the same limitations, restraints, and roadblocks which have prevented women from being employed in or promoted to such positions in other institutions are found in the ICJS. Therefore, before turning to the ICJS material this section explores some general notions about women and employment. First, it examines the dimensions of women in employment, generally, and in professional positions. Secondly, it introduces the legal environment surrounding women in employment.

The problems of equal rights and employment opportunities for women are pervasive. In 1973, there were over 34.8 million women in the work force, comprising 38.5% of the total labor pool.[10] Of these women, 18.5 million, representing 59%, were married and living with their husbands. There is a concentration of women in low-paying, dead-end jobs. As a result, the average woman worker earns about three-fifths of what a man earns,[11] and a fully employed woman high school graduate receives less income on the average than a fully employed man with less than eight years of schooling.

These figures must be understood in the context of the reasons why women work. Most women work because of economic need; two-thirds of all women workers are single, divorced, widowed, or separated, or have husbands who earn less than $7,000 a year.[12] About one out of nine families is headed by a woman, and among poor families, almost two out of five. Approximately three out of ten black families are headed by a woman; the ratio in poor black families is almost three out of five. Other women

[10]Statistics mentioned in this section are from the Women's Bureau, Department of Labor.

[11]In 1971 the median incomes for full-time, year-round work were: white men, $9,373; minority men, $6,598; white women, $5,490; and minority women, $4,674.

[12]The working wife's income frequently raises the family above the poverty level. In 1970 classified as poor were those non-farm families of four with total income of less than $4,000. In husband-wife families, fourteen percent are poor if the wife does not work; four percent are poor if the wife does work.

work because of other, non-monetary needs, that is, for the same reasons many men work—psychological fulfillment, ego-gratification, and a desire to succeed. Moreover, not only are women working in increasing numbers but they have also begun to break out of traditionally female occupations.[13]

Women are moving into "executive suites" in increasing numbers. For example, women are being promoted to supervisory and managerial positions by manufacturing companies. Banks are moving women from teller positions to branch managers. Insurance companies have encouraged women to assume positions in sales.[14] And there has been a small increase in the number of women with graduate degrees during the past decade.[15] However, the percentage of women in particular fields has declined since the 1920's. Today women constitute about one percent of all engineers, 3.5 percent of all lawyers, seven percent of all physicians, eight percent of all scientists, and nine percent of all full professors in the field of academics.[16]

Generally there exists a scarcity of information about women in the professions. What is available often is outdated and does not take into account the effects of recent legislative changes or of the revitalized women's movement. The first congressional committee hearings concerning discrimination on the basis of sex, however, provided an opportunity to gather descriptive information and to make public the breadth, depth, and pervasiveness of sex discrimination in education, the labor market, the professions, government, and even in the law itself.[17] By describing the status

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[13]Steinem, *If We're So Smart, Why Aren't We Rich*, 1 Ms. 37, 127 (June 1973).

[14]Bralove, *Where the Boys Are*, Wall Street Journal, Apr. 18, 1974, at 1, col. 6.

[15]The number of women graduate and doctoral business students has increased from 3.1% to 5.5% of all such students in five years. Bralove, *supra* note 14. Law school enrollment of women in 1973 was nearly nine times the enrollment of women in 1963. Ruud, *supra* note 6. There has also been a similar increase in the number of women lawyers but as a percentage of all lawyers their number has only barely increased. DISCRIMINATION AGAINST WOMEN, CONGRESSIONAL HEARINGS ON EQUAL RIGHTS IN EDUCATION AND EMPLOYMENT 502 (C. Stimpson ed. 1973) (statement of attorney Margaret Laurance) [hereinafter cited as STIMPSON].

[16]STIMPSON, *supra* note 15, at 4 (comment by subcommittee chairperson Edith Green).

[17]*Id.* at ix, x (foreword by Edith Green). The special subcommittee hearings were based on a consideration of H.R. 16,098, 91st Cong. 2d Sess. § 805 (1970), directed at discrimination against women. The bill provided for four changes in equal opportunity laws:

(1) amendment of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to prohibit discrimination on the basis of sex in federally assisted programs;

of women in various professions we may better understand the professional women in the criminal justice system and incidentally dispel the "popular wisdom" that women are already powerful and "more equal."

Information available in 1970 showed that women constituted more than forty percent of all white collar workers. However, only one out of ten working women was in a management position and only one out of seven professional jobs was filled by a woman. The resulting gap in earnings was such that in 1968 only three percent of the women workers had incomes of at least $10,000, whereas among men twenty-eight percent earned at least that much.[18] Or to describe the situation in another way, ninety-four percent of all jobs which pay at least $15,000 a year are held by white men; women and minority men hold the remaining six percent.[19]

One professional area studied was business. Given business' overall concern for productivity and profits one might anticipate that it would be far easier for a woman to be successful there if she were good. However, a recent survey of twenty top organizations[20] showed that not only do women face substantial barriers in their rise to the top, but the need to constantly caution firms to hire only "qualified" women belied the firms' commitment to individual worth. One never sees the caution "hire only qualified men." Of course, one would expect a firm to hire and promote on the basis of ability and qualifications; to assume it would not do so in regard to women employees or applicants is only one illustration of the fact that women are considered in a different way, in a different light, from men.

The survey of twenty prominent employers included ten industrial companies from among the top one hundred companies on the *Fortune* "500" list. Five of the ten surveyed were among the top twenty. The other ten organizations, such as diversified financial institutions and retailers, were on the *Fortune* "50

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(2) removal of the educational institution exemption from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e;

(3) removal of the exception of executive, administrative, and professional employees from the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d); and

(4) authorization of the Civil Rights Commission to study discrimination against women.

Although this particular House bill was defeated in 1970, by 1972 the aims of section 805 had been realized. See text accompanying note 46 *infra*.

[18]STIMPSON, *supra* note 15, at 502-03 (statement of Margaret Laurance).

[19]Steinem, *supra* note 13, at 126.

[20]Fretz & Hayman, *Progress for Women—Men Are Still More Equal*, 51 HARV. BUS. REV. 133, 134 (Sept.-Oct. 1973).

largest" list. In these twenty corporations, which employed approximately two million people, women represented thirty-six percent of the total work force. On the other hand, women officials, managers, and professionals accounted for less than one percent.[21] Not only were attitudes of employers reflected in this study but also mirrored was the fact that men are still considered better risks for managerial training positions.[22] Further, "equal pay for equal work," although always a stated policy, was rarely a practice.[23] The study concluded from all the available data that women professionals perform on an equal level with men professionals. However, it showed that bias against women still exists. For example, women were not judged as seriously as men, or the judgment of a woman's performance was affected by the negative attitudes of her colleagues. The authors listed three sources of negative reactions: other supervised women, men who feel threatened by a woman's advancement, and minority group employees who may fear being slighted or ignored because of the company's concern about women.[24] Because of the stereotyped attitudes of their colleagues, many women in management must tread carefully. On the one hand, a woman cannot show emotion for fear of being labeled tempermental and must remain low-keyed to halt subordinates' ideas that she is "shrill." On the other hand, if a woman manager is timid, hesitant or nervous, she has confirmed the female stereotype.[25] Employment under these contradictions and traps is a strain; most men are allowed a wider range of acceptable emotions and more personality variations are successfully tolerated.

Another profession studied was science and engineering. The National Research Council recently completed a survey of the nation's doctorate-level scientists and engineers,[26] detailing unemployment levels, salaries, and types of employment positions. For the 244,900 doctoral scientists and engineers, in 1973 the unemployment rate was 1.2 percent. Women, who constituted nine percent of the doctoral population, reported an unemployment of 3.9 percent while that of men was only 0.9 percent. The 1973 median annual salary was $20,890; the highest median salary, $22,490, was in engineering, the area with the lowest percentage of women. The women's median salary was $17,620, $3,500 less than that of

[21] *Id.*

[22] *Id.* at 133.

[23] *Id.* at 137.

[24] *Id.* at 140.

[25] Bralove, *supra* note 14.

[26] The survey was sponsored by the National Academy of Sciences in 1973. A complete copy of the report is on file at the Office of Research and Advanced Studies, Indiana University, Bloomington, Indiana.

the men. Of the various employment positions, approximately sixty percent of the working population studied were employed by educational institutions; more than twenty percent held positions in business and industry. Over forty percent of those working were engaged in research and development and its administration; an additional thirty-eight percent were in teaching. Seventy-five percent of the women were concentrated in the areas of biosciences, psychology, and social sciences.

Because the woman doctoral scientist or engineer often fits also into the category of women doctorates as academicians, one should consider some of the attitudinal problems these women face in the context of academics. For example, a 1969 study of the woman doctorate by Helen Astin dealt in part with obstacles encountered in a professional woman's career development. In Astin's sample of 1460 women doctorates, nine out of ten were working, although over half were married and had families.[27] In fact, the problem of adequate and dependable help, housekeeper or babysitter, was considered the greatest obstacle encountered by these women. Unexplained salary differentials, tenure, and promotion policies, which included mandatory maternity leaves, and the usual subtle types of discrimination which prove harder to assess[28] were forms of perceived employer discrimination mentioned by the women surveyed.

Interestingly, the percentage of degrees earned by women has not continually grown since the turn of the century but in fact peaked during the 1930's and 1940's. At the bachelor degree level, women received nineteen percent of the degrees at the turn of the century, forty percent in the early 1960's and forty-three percent during the latter part of that decade. At the master's degree level, women accounted for nineteen percent of the degrees at the turn of the century, thirty-eight percent in 1940 and thirty-two percent in the early 1960's. At the doctorate degree level, women earned six percent in the early 1930's, thirteen percent in 1940 and eleven percent in the 1960's.[29] In 1969-1970, there were 29,866 doctoral degrees granted; women accounted for 3,976, or approximately thirteen percent.[30]

Since graduate training is essential to an academic career, it is apparent that women in higher education have been losing

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[27]H. ASTIN, THE WOMAN DOCTORATE IN AMERICA (1969), *reprinted in* STIMPSON, *supra* note 15, at 449.

[28]*Id.* at 451.

[29]Rossi, *Discrimination and Demography Restrict Opportunities for Academic Women*, 48 COLLEGE AND UNIVERSITY BUSINESS 74 (Feb. 1970), *reprinted in* STIMPSON, *supra* note 15, at 455.

[30]U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DIGEST OF EDUCATIONAL STATISTICS 90 (1971).

ground. In 1870, one-third of the faculty in the country's colleges and universities were women. Today women comprise only about one-fourth of the total. At prestigious universities in the "Big Ten," women hold ten percent or less of the faculty positions.[31] For example, in 1973 at Indiana University, Bloomington, only one out of thirty-five distinguished professors was a woman. Thirty-three full professors, 38 associate professors, 64 assistant professors and 6 instructors were women out of totals of 555, 405, 405, and 29 respectively,[32] making up a total of 143 women out of 1429 positions.

In defense of these statistics it is often alleged that there is a lack of qualified women who hold doctorates in certain areas. Defenders also point to the fact that a higher percentage of women doctorates go into college or university teaching than do similarly educated men.[33] But, while women earn 24% of the English doctoral degrees awarded nationally, 28% of the English degrees from the fifteen top schools, and 21% of the English degrees at Indiana University, women faculty members comprise only 8.3% of the total English faculty at Indiana University, Bloomington.[34] Similar proportions exist in other disciplines. Once hired, women faculty are not immune from the unequal pay for equal work problem. One author places a good deal of responsibility upon typical departmental chairmen who have difficulty distinguishing between women on their respective faculties and their own homemaker wives.[35] Also contributing to the problem are department chairmen who see nothing wrong with paying a woman less than a man if she is married because she does not need as much, or if she is not married, because she can get by on less.[36]

Another professional area examined was medicine. Estimates by the Public Health Service indicate that by 1975 this country will need over 100,000 more physicians than are presently active.[37] Since fewer than 8,000 physicians were graduated in June, 1967, the problem in this profession is slightly different from the mar-

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[31] STIMPSON, *supra* note 15, at 415 (statement of Dr. Bernice Sandler).

[32] Figures from the Office of Institutional Research, Indiana University, Bloomington, Indiana. These totals exclude lecturers, visiting appointments, and other "academic" appointments such as counselors or research associates. In the fall of 1973 there were sixty-three tenured women faculty members.

[33] STIMPSON, *supra* note 15, at 415 (statement of Dr. Bernice Sandler).

[34] Figures from the Office of the Dean for Women's Affairs, Indiana University, Bloomington, Indiana.

[35] Rossi, *supra* note 29, at 77, *reprinted in* STIMPSON, *supra* note 15, at 457.

[36] STIMPSON, *supra* note 15, at 417 (statement by Dr. Bernice Sandler).

[37] WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, FACTS ON PROSPECTIVE AND PRACTICING WOMEN IN MEDICINE (1968), *reprinted in* STIMPSON, *supra* note 15, at 464. The following information is from that report.

ket academics face. In 1965-1966 women accounted for nine percent of the applicants and almost nine percent of the acceptances in medical schools. In that same year, of the women who applied, 47.7% were accepted; the figure for men was 48.2%. The study showed that women, who comprised 6.1% of the total active physicians, tended to prefer practice in hospitals, teaching, preventive medicine, administration, or research rather than private practice. In 1965, at least ten percent of all physicians engaged in anesthesiology, pediatrics, physical medicine and rehabilitation, preventive medicine, psychiatry, public health, and pulmonary diseases were women.[38]

The results of a survey studying attitudes of members of the medical profession toward women physicians demonstrated no substantial difference from attitudes expressed by other professionals toward their female colleagues.[39] Women were basically suspect characters and carefully screened to ensure their commitment to medicine. The survey also revealed a strong reluctance to deal with or provide for pregnancy and childbearing situations.

Finally, consideration is given to the status of women in the legal profession.[40] There were in 1970 over 8,000 women lawyers in the United States. Although the federal government is deemed the most nondiscriminatory employer of women, the percentage of women attorneys holding federal positions declined from 7% in 1959 to 6.2% in 1969. Women tend to be hired at a lower grade and remain there longer than men. In other positions, such as judges and hearing examiners, the situation is worse.[41] In law firms the situation is no less questionable. For example, a survey of forty major law firms in six different cities indicated there were only 186 women out of 2,708 attorneys.[42] Once employed by a firm, a woman is likely to make much less money than her male colleague and will more often engage in trusts and estates, domestic relations, and tax work. Given these circumstances she is also less likely to become a partner.[43]

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[38]When grouped in five categories women comprised the following percentages of total physicians in each category: general practice, 5.2%; medical specialties, 8.6%; surgical specialties, 3.5%; psychiatry and neurology 11.5%; and other specialties, 7.4%. *Id.* at 474.

[39]H. KAPLAN, STUDYING ATTITUDES OF THE MEDICAL PROFESSION TOWARD WOMEN PHYSICIANS: A SURVEY SPONSORED BY THE NATIONAL INSTITUTE OF MENTAL HEALTH (1969), *reprinted in* STIMPSON, *supra* note 15, at 482.

[40]The material in this section is from a statement submitted to the Special Subcommittee on Education by Margaret Laurance, reported in STIMPSON, *supra* note 15, at 502.

[41]In 1970, only one percent of federal judges were women. *Id.*

[42]*Id.* at 505.

[43]An interesting and repeatedly quoted study is White, *Women in the Law*, 65 MICH. L. REV. 1051 (1967).

The attitudes of members of the legal profession toward women are predictable as well as illustrative of attitudes held by other professionals. Law firms are concerned that a woman will marry and leave work, or if already married, will have children and quit. Women do marry but rarely cease working for that reason.[44] Women also have children and do sometimes stop working on that account, although this withdrawal from work may be, and in fact usually is, temporary. This career interruption is related to and affected by maternity leave provisions and problems of child care which will be discussed later. If a woman is already married and has older children, some employers will hesitate to hire her because they believe she is too old to train or does not have enough "productive" years left to make their investment worthwhile. Another concern expressed by law firms and a reason cited for considering a woman attorney "unqualified" is that clients will not accept advice from a woman. Finally, there is the belief in almost all the professions that a woman's character and personality will handicap her performance. In the case of an attorney it is often believed that she is not tough or analytical enough to be "successful."

Although all these professions are for the most part covered by equal employment opportunity laws which are outlined below, the status of women as professionals is not equal to that of men. This inequality results, as has been pointed out, from traditional attitudes, acceptance of stereotypes, and a general belief that women are innately unqualified. In a survey of 163 companies[45] some of the suggestions offered to foster compliance with equal opportunity laws and to overcome the above listed obstacles included the adoption of effective affirmative action programs, a national emphasis on hiring and promoting women, and the use of role models. The authors agree. Some of the ideas and infor-

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[44] *Id.* at 1066.

[45] In December, 1971, the Bureau of National Affairs conducted a study among the BNA's Personnel Policies Forum and received responses from 163 nationwide companies. There were ninety-eight large companies with one thousand or more employees, fifty-eight percent of which were manufacturing, twenty-eight percent non-manufacturing, and fifteen percent non-business. In a majority of these firms women accounted for five percent or less of the first level supervisors, middle management, and professional staffs. However, fifty-eight percent of the companies stated that they had more women in management positions than ever before. Three-fourths of the companies had no women in top management. Cited as obstacles for women were lack of qualification and education and stereotyped roles or prejudices. Most companies perceived more discrimination against women in the industry as a whole than within their own companies. FAIR EMPL. PRAC. MANUAL, Company Policies and Practices 490:601.

mation presented in this Article are intended to simplify attainment of these objectives.

Several federal and state laws and regulations are relevant to women and employment practices within the ICJS. At the federal level these include the equal opportunity provisions of the Civil Rights Act of 1964,[46] the Fair Labor Standards Act,[47] Executive Order 11,246 relating to employment by federal contractors,[48] and provisions of the United States Constitution.[49] At the state level there are the Indiana Civil Rights Law[50] and local ordinances which regulate employment practices in cities and counties.[51] The following is a brief introduction to the relevant portions of each. An analysis of frequently raised issues is deferred until later.

Basic to any understanding of equal opportunity laws is Title VII of the 1964 Civil Rights Act.[52] Not only does it provide that it is an unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual because of race, color, sex, religion, or national origin, but also it bans discrimination in compensation, terms, conditions, and privileges of employment.[53] More importantly, Title VII was amended in 1972 to include state and local governments as well as educational institutions in their

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[46]42 U.S.C. §§ 2000e *et seq.* (1970), *as amended,* (Supp. III, 1973) [hereinafter referred to as Title VII].

[47]Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970); Equal Pay Amendments of 1972, *id.* § 213(a) (Supp. III, 1973); Fair Labor Standards Amendments of 1974, Act of April 8, 1974, Pub. L. No. 93-259, § 6(a)(2), U.S. Code Cong. & Adm. News 615, 619 (1974).

[48]Exec. Order No. 11,246, 3 C.F.R. 169 (1974), 42 U.S.C. § 2000e (1970).

[49]*E.g.*, U.S. CONST. amend. XIV.

[50]IND. CODE §§ 22-9-1-1 to -12 (Burns 1973).

[51]*E.g.*, BLOOMINGTON, IND., MUNICIPAL CODE §§ 2.60.010 to .100 (1972).

[52]42 U.S.C. §§ 2000e *et seq.* (1970), *as amended,* (Supp. III, 1973). Since the July 2, 1965, effective date there has been a wealth of articles explaining the ramifications of this statute, detailing various case law developments, and recommending future changes. For a fairly complete pre-1972 amendment article, see *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109 (1971) [hereinafter cited as *Developments*]. A fairly detailed bibliography may be found in 1 WOMEN'S RTS. L. RPTR. 78 (Winter-Spring 1972-73).

[53]42 U.S.C. § 2000e-2(a)(1) (1970). The Act further provides that it is unlawful for an employer

> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise *adversely affect his status* as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(2) (Supp. III, 1973) (emphasis added).

roles as employers.[54] One particular provision of Title VII which affects most sex discrimination cases is the section dealing with the bona fide occupational qualification (bfoq).[55] This provision allows an employer to hire or to employ persons on the basis of their sex only in those limited circumstances in which the employee's sex is "reasonably necessary to the normal operation of that particular business or enterprise."[56] However, this exception has been very narrowly construed by the courts[57] and the Equal Employment Opportunity Commission (EEOC) as well.[58]

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[54]*Id.* § 2000e(b) defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ." An "employee" is defined as

> an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political sub-division of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's *personal staff*, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

Id. § 2000e(f) (emphasis added).

[55]*Id.* § 2000e-2(e)(1).

[56]*Id.*

[57]The first test of the EEOC's position and guidelines, see note 58 *infra*, was Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), which held that an employer must show a factual basis for his belief that women as a class would be unable to perform the job, which in that case involved lifting weight over thirty pounds. However, the *Weeks* decision did not go as far as it should have since the court would apparently uphold the rule if "substantially all" women could not perform. This standard is still based on characteristics associated with one sex, not individual capabilities. For other weight and hour limitation cases, *see* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969); Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd*, 444 F.2d 1219 (9th Cir. 1971).

Another case interpreting the bfoq is Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), which held that customer preference was irrelevant in determining whether men were suitable for the job of flight cabin attendant. Essential to the court's holding was a very narrow definition of the job.

A narrow interpretation of the bfoq exception is necessary if Title VII is to retain its force since it provided a potential loophole for employers who wish to continue discriminatory practices. Although inconsistent decisions were common during the first years of litigation, most courts accept the notion that the proof of a bfoq cannot be made by a commonly held stereotype.

[58]Title VII created the EEOC which is charged with the responsibility of administering the Act. 42 U.S.C. § 2000e-4 (1970), *as amended*, (Supp. III, 1973). The Commission has the duty to seek voluntary conciliation of disputes; to bring civil actions against noncomplying employers, unions, and

The bfoq provision and the apparent need for its continual interpretation illustrates that the law generally, and equal opportunity laws in particular, must deal with many myths about women workers. For example, women are often considered emotionally unstable and physically weak; hence, it is deemed necessary to protect them from physical and moral hazards. Or, since women really do not need to work, they are unlikely to be long-term employees. These and other traditional attitudes and stereotyped notions about women do not form the basis for a valid bfoq exception. "Sex" itself is the occupational qualification. "It is only where the intrinsic attributes of one sex or the other are a necessary qualification for the job that the bfoq clause should come into play."[59] The policies expressed in Title VII and the EEOC's

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employment agencies, *id.* § 2000e-5(f)(1) (Supp. III, 1973); and to promulgate guidelines, *id.* § 2000e-12(a) (1970). In the nine year history of the EEOC, the Commission has twice changed its position on the bfoq, especially in relation to state protective laws. *See* 29 C.F.R. § 1604.1(b), (c) (1966); 29 C.F.R. § 1604.1(b)(1), (2) (1970); 29 C.F.R. § 1604.2(b) (1973). Today its position is very clear. 29 C.F.R. § 1604.2(a) (1973) states:

> The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.
>
> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
>
> (iii) The refusal to hire an individual because of the preferences of the coworkers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

[59] *Developments, supra* note 52, at 1179. *See generally id.* at 1176-86. The nature of the bfoq exception is more easily demonstrated if one remembers that Congress chose to ignore race-defined differences. An examination of examples of religion and national origin bfoqs also reveals the meaning of the exemption. A theology professor at a religious college was a common example before the 1972 amendment which exempted all employment decisions by religious institutions. 42 U.S.C. § 2000e-1 (Supp. III, 1973). This amendment, however, raises serious first amendment problems.

guidelines lead to the rejection of stereotyped employment decisions. Sex is to be considered irrelevant except in only rare circumstances. Curiously, the overall policy expressed by this part of the civil rights legislation is one which is both conservative and traditional: the "work ethic." That is, if someone wants to work, no one should put artificial barriers in his or her way.

A second federal statute which relates to women and employment is the Fair Labor Standards Act.[60] Of primary importance is the 1963 Equal Pay Act[61] amendment which mandates equal pay for equal work regardless of sex. The most difficult problems posed by the statute are encountered in determining whether male and female workers are actually doing substantially the same work, and if so, whether any pay differential which exists is based on factors other than the employee's sex. Within the ICJS, such problems might arise in the context of whether a woman jail matron should receive the same compensation as a male turnkey. In 1972 the Equal Pay Act was amended[62] to extend its coverage to professional, executive, and administrative personnel. Obviously, the question of whether two executives are doing substantially the same work will pose even more difficult problems. The 1974 amendments to the Fair Labor Standards Act[63] extend its coverage to include individuals employed by state or local governments subject to a rather typical exclusion of elected officials and policy makers.[64]

Thirdly, there are the provisions of Executive Order 11,246[65] which prohibit certain federal contractors from discriminating against any employee or applicant on the basis of sex, as well as race, religion, or national origin. This Order also requires "af-

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See King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974). The example given in Congress was an Italian chef in an Italian restaurant. 110 CONG. REC. 2549, 2583-93 (1964). This example should be refined to include only those cases in which the patrons are aware of the chef's nationality and feel that it is important.

[60]29 U.S.C. §§ 201-19 (1970), *as amended*, Act of April 8, 1974, Pub. L. No. 93-259, U.S. Code Cong. & Adm. News 615 (1974).

[61]Act of June 10, 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, *amending* 29 U.S.C. § 206 (codified at 29 U.S.C. § 206(d) (1970)).

[62]Act of June 23, 1972, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 375, *amending* 29 U.S.C. § 213 (1970) (codified at 29 U.S.C. § 213 (Supp. III, 1973)).

[63]Fair Labor Standards Amendments of 1974, Act of April 8, 1974, Pub. L. No. 93-259, U.S. Code Cong. & Adm. News 615 (1974), *amending* 29 U.S.C. §§ 201-19 (1970).

[64]*Id.* § 6(a)(2), U.S. Code Cong. & Adm. News 619 (1974). *See also* 42 U.S.C. § 2000e(f) (Supp. III, 1973).

[65]3 C.F.R. 402 (1974), 42 U.S.C. § 2000e (1970); Exec. Order No. 11,478, 3 C.F.R. 446 (1974), 42 U.S.C. § 2000e (1970). The Order covers those contractors who receive more than $10,000.

firmative action"[66] by employers to ensure that applicants are employed and that employees are treated equally during employment, without regard to their race, sex, religion, or national origin.

A fourth federal standard relevant to employment policies and practices of governmental employers is the Constitution. The due process and equal protection clauses of the fourteenth amendment provide some degree of protection against arbitrary discrimination for women who work for state and local governments or their agencies.[67] The employer not only must provide "equal protection" but must also allow the woman employee her first amendment freedoms. Before the recent federal amendments to Title VII and the Fair Labor Standards Act, these constitutional protections were very important, although limited somewhat in their reach.[68]

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[66]For a detailed discussion of affirmative action, see text accompanying note 339 *infra*. Although the Department of Labor, Office of Federal Contract Compliance (OFCC) has primary authority for enforcement of the Executive Order, the OFCC has, in many cases, delegated that authority. In the present case, the Law Enforcement Assistance Administration has been designated. See note 341 *infra*.

[67]The extent of protection provided government employees is presently unsettled and depends upon the particular issues and facts. Recently the Supreme Court struck down mandatory maternity leaves for public school teachers primarily on the basis of the due process clause of the fourteenth amendment, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); denied fifth amendment due process claims by federal employees, Arnett v. Kennedy, 94 S. Ct. 1633 (1974); Sampson v. Murray, 94 S. Ct. 937 (1974); and distinguished fourteenth amendment claims of untenured college professors, Roth v. Board of Regents, 408 U.S. 564 (1972); *cf.* Perry v. Sindermann, 408 U.S. 593 (1972). The Court also upheld the constitutionality of the Hatch Act, 5 U.S.C. § 7324(a)(2) (1970), in United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). However, the Court let stand a circuit court decision which held that the dismissal of non-civil service public employees on the basis of membership in or support of a political party violated the employees' fourteenth amendment rights, Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 908, 943 (1973).

For a critique of the use of federal courts as forums for employment-due process suits, see Mohr & Willett, *Constitutional and Procedural Aspects of Employee Access to the Federal Courts: Promotion and Termination*, 8 VALPARAISO L. REV. 303 (1974).

[68]It is more certain that a government employer must provide its employee "equal protection." Section 1983 has been the usual mode for raising such fourteenth amendment constitutional questions:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Relevant state statutes which regulate employment practices are the Indiana Civil Rights Law[69] and various local ordinances. The Indiana Civil Rights Law provides for equal opportunity in employment as well as in education, housing, and public conveniences and accomodations in order "to eliminate segregation or separation based solely on race, religion, color, sex, national origin or ancestry."[70] Under the Indiana Law an "employer includes the state, or any political or civil subdivision thereof, and any person employing six or more persons within the state,"[71] and an employee is defined as "any person employed by another for wages or salary."[72] This Act also contains authority for cities and counties to set up their own local equal opportunity commissions.[73]

These laws, although their origins differ, are consistent in the demands they place upon employers. Their basic aim is to encourage, indeed force, employers to review employment practices and to insure that decisions are made on the basis of individual capacities and capabilities rather than on stereotyped images and characteristics. Of course, these statutes and regulations may be affected by the "police powers" limitation or their status made dependent upon the legislative authority of the city, town, or county which enacts them, but they are, the authors believe, crucial.[74]

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42 U.S.C. § 1983 (1970).

Thus, when state or individual action deprives persons of rights secured by the federal Constitution or a federal statute, section 1983 provides a cause of action for damages and injunctive or other equitable relief. For some representative cases, see text accompanying notes 286, 293 *infra*. But just as the Supreme Court had been hesitant to declare classifications based on sex unconstitutional until recently, *see* Reed v. Reed, 404 U.S. 71 (1971), the lower courts have exhibited the same reluctance to apply section 1983. It is curious that the Supreme Court changed its position at about the same time that Title VII was extended to government and educational employees and the Equal Rights Amendment was submitted to the states.

[69] IND. CODE §§ 22-9-1-1 to -12 (Burns 1974).

[70] *Id.* § 22-9-1-2.

[71] *Id.* § 22-9-1-3(h).

[72] *Id.* § 22-9-1-3(i).

[73] *Id.* § 22-9-1-12. For example, Bloomington's Human Rights Commission is patterned directly after the Indiana Commission and uses the same language in its ordinance with similar definitions of "employer" and "employee." BLOOMINGTON, IND., MUNICIPAL CODE §§ 2.60.010 to .100 (1972).

[74] Title VII, the Indiana Civil Rights Law, and the Bloomington Human Rights Commission ordinance have similar procedures, including specific time limitations, and have established broad remedial powers such as the power to order affirmative action, reinstatement, upgrading and compensatory damages. The state and municipal commissions are further empowered to issue cease and desist orders which are enforceable through appropriate courts. There are, in addition to those cited, other laws which regulate discrimination in employment. For example, age discrimination laws exist at both the federal

III. ICJS Employment Requirements

In light of this background concerning women and employment and the general legal environment thereof, this section turns now to the specific statutory requirements for certain ICJS executive, managerial and professional positions. In the next section these specific requirements will be analyzed for their possible discriminatory effects on women.

A. Law Enforcement Officials

The notion of women in law enforcement is not a new concept in this country. The Los Angeles Police Department began hiring women for full-time police service in 1910.[75] Historically policewomen were hired to assist with adult women and juvenile suspects.[76] Despite media rhetoric to the contrary, the policewoman's role today has not changed much from those early years.[77] Particularly noteworthy, though, is the increasing use of policewomen in rape cases.[78]

There has been increasing public interest in the status of women in law enforcement in Indiana.[79] College coeds in Indiana

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and state level. 29 U.S.C. §§ 621 *et seq.* (1970); Ind. Code §§ 22-9-2-1 to -11 (Burns 1974). Furthermore, if a union is involved an employer may be under other constraints, including a duty of fair representation analogous to the one under the National Labor Relations Act. United Packinghouse Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969). Finally, one commentator has advanced the argument that 42 U.S.C. § 1981 (1970) may properly be invoked in a suit for sex discrimination and is indeed preferable. *See* Stanley, *Sex Discrimination and Section 1981*, 1 Women's Rts. L. Rptr. 2 (Spring 1973).

In most of the following discussion we will focus on the specific requirements and legal interpretations of Title VII since it is the most inclusive and has the most case law development.

[75]E. Graper, American Police Administration 226 (1921); C. Owings, Women Police: A Study of the Development and Status of the Women Police Movement 99 (1925).

[76]E. Graper, *supra* note 75, at 228-29.

[77]P. Bloch & D. Anderson, *supra* note 5, at 49; President's Comm'n on Law Enforcement and Administration, Task Force Report on the Police 125 (1967).

[78]In 1973 the New York City Police Department established the Sex Crimes Analysis Unit within the Detective Bureau to handle sex crimes. This unit is staffed by twenty-six female detectives and is headed by Lt. Mary L. Keefe. Cottell, *Rape—The Ultimate Invasion of Privacy*, 43 F.B.I. Law Enf. Bull. 2 (May 1974). For a description of Miami's experience, *see* Garmire, *Female Officers in the Department*, 43 F.B.I. Law Enf. Bull. 11 (June 1974).

[79]*See, e.g.*, Indiana Daily Student, Mar. 8, 1974, at 5, col. 3 (Professor Backs More Policewomen); Bloomington Daily Herald-Telephone, Mar. 2, 1974, at 8, col. 1 (Opportunities Are Limited in Criminal Justice Field for Women); *id.*, Feb. 22, 1974, at 10, col. 7 (Ginny Wasser Is County's 1st Female Candidate for Sheriff); Indianapolis Star, Aug. 8, 1973, at 34, col. 7 (Use of Policewomen in New Jobs Indicated).

are considering law enforcement careers in increasing numbers.[80] In contrast, the Indiana State Police has no female officers and until 1973 accepted applications only from men.[81] Although some women applicants have passed preliminary screening by the Indiana State Police,[82] none has yet become Indiana's first state policewoman.[83] Nationwide, women not only are entering law enforcement at the patrol level but also are beginning to move into positions such as investigators, desk sergeants, and commanders, as well as into other middle-level executive and management posts.[84] The scarcity of women at these levels in Indiana seems to be a phenomenon rare within the ICJS.[85] Thus, this study turns to a survey of the legal qualifications for such middle and upper level ICJS law enforcement positions to determine if the impediments lie there.

On March 9, 1945, Indiana's State Police Department was created by statute[86] under the administration, management, and control of the State Police Board with a governor-appointed Superintendent of the State Police. The Superintendent is the executive officer and has general charge of the work of the department. The express statutory qualifications provide that:

> The superintendent shall be selected on the basis of training and experience, and shall have served at least five (5) years as a police executive, or have had five (5) years' experience in the management of military, semi-military or police bodies of men, to equip him for the position

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[80]Approximately twenty percent of upperclass female undergraduates majoring in forensic studies at Indiana University, Bloomington in September of 1973 indicated that they plan to seek employment in law enforcement occupations. V. Streib, Forensic Studies Students and Their Evaluation of Forensic Studies, October 1973 (unpublished survey report in Department of Forensic Studies, Indiana University, Bloomington, Indiana).

[81]Bloomington Daily Herald-Telephone, June 20, 1973, at 2, col. 1; Louisville Courier-Journal, Aug. 19, 1973, at A2, col. 1.

The Indiana Civil Liberties Union has recently filed suit on behalf of an unsuccessful female applicant challenging the state police height requirement as discriminatory, Crose v. Bowen, Civil No. 74-396 (S.D. Ind., filed July 22, 1974). On September 16, 1974, the Indiana State Police Board voted three to two to eliminate the 5 foot 9 inch minimum. The minimum, if any, to be substituted was not revealed. The action by the Board presumably was in reaction to *Crose*. Indianapolis Star, Sept. 17, 1974, at 12, col. 1.

[82]Indianapolis Star, Sept. 8, 1973, at 24, col. 7.

[83]*Id.*, Oct. 19, 1973, at 21, col. 2.

[84]P. Bloch & D. Anderson, *supra* note 5, at 53; Pogrebin, *supra* note 4, at 36.

[85]The Appendix to this Article reveals the extreme rarity of women in law enforcement in Indiana.

[86]Ind. Code § 10-1-1-1 (Burns 1973).

> and shall possess training in police affairs or public administration.[87]

The general tenor of the qualifications indicates that a male superintendent is contemplated. As noted above, Indiana's State Police Department has no female officers so of course no women have served five years as a police executive in that department. Almost as rare are women who have had five years of experience in the management of any military, semi-military or police bodies of men. Thus, the pool of prospective superintendent candidates with sufficient experience is noticeably short of women. The statute's training requirement for superintendents seems to be met by all state police employees,[88] since no police employee is assigned to regular active duty until successful completion of training school.[89] The Superintendent, with the approval of the State Police Board,[90] determines the qualifications and prerequisites for the various middle-management positions[91] and appoints persons to those positions.[92] Thus, as is common in police agencies, state police employees enter at the "patrol" level and work their way up through the ranks.

In Indiana the office of county sheriff has existed as a constitutional office since November 2, 1948.[93] Sheriffs serve four year terms and may not serve more than eight years in any twelve year period.[94] As county officers, sheriffs are elected by the voters of the respective counties.[95] Moreover, a candidate for sheriff must be an elector of the county and an inhabitant of the county "during one year next preceeding his appointment."[96] Sheriffs have general police powers within the county, manage the jail and prisoners therein, and serve court processes.[97] They may appoint deputy sheriffs[98] or county policemen[99] and, with the approval of the sheriff's merit board if one exists,[100] determine

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[87] *Id.*

[88] A police employee is an employee of the State Police Department who is assigned police work as a peace officer. *Id.* § 10-1-1-2(3).

[89] *Id.* § 10-1-1-5.

[90] *Id.* § 10-1-1-1.

[91] *Id.* § 10-1-1-3.

[92] *Id.* § 10-1-1-4.

[93] IND. CONST. art. 6, § 11.

[94] *Id.*

[95] *Id.* art. 6, § 2; IND. CODE § 17-3-5-1 (IND. ANN. STAT. § 49-2801, Burns 1964).

[96] IND. CONST. art. 6, § 4.

[97] IND. CODE §§ 17-3-5-2, -3 (IND. ANN. STAT. §§ 49-2802, -2803, Burns 1964).

[98] *Id.* §§ 17-3-71-2, -13-1 (IND. ANN. STAT. §§ 49-1002, -2805).

[99] *Id.* §§ 17-3-14-3, -6 (IND. ANN. STAT. §§ 49-2823, -2825).

[100] *Id.* § 17-3-14-1 (IND. ANN. STAT. § 49-2821).

the qualifications and prerequisites for the various middle-management positions and appoint persons to those positions.[101] Since the office of sheriff is elective in Indiana, working up through the ranks is not the sole means of access to that position. Although most successful sheriff candidates probably have had experience in law enforcement, the only mandatory requirement other than those mentioned above is election by the voters.

Township constables are elected for four year terms[102] and act as general conservators of the peace[103] throughout their respective counties[104] with power to arrest fugitives anywhere in the state.[105] Township constables must reside and keep their offices within their respective townships.[106] As with sheriffs, township constables are elected, so the qualifications for office are primarily determined by the voters.

The most prominent category of law enforcement officials for purposes of this study is chiefs of city police departments. Chiefs are appointed by the mayor with approval of the board of public safety in first class cities[107] of which in Indiana there is only one—Indianapolis. In Gary,[108] Evansville,[109] Michigan City,[110] and Hammond,[111] the mayor has the sole power to appoint the police chief. Otherwise, police chiefs are appointed by the board of public safety in larger cities[112] and by the board of metropolitan police commissioners[113] in most smaller cities. A police chief of any city over 10,000 population must have had at least five years of continuous service with that city's police department immediately prior to appointment.[114] The Indianapolis police chief must be chosen from the ranks of lieutenant and above in that department,[115] and in Hammond the chief normally must be chosen from the ranks of captain or above.[116] In Evansville and Michi-

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[101] *Id.* § 17-3-14-6 (IND. ANN. STAT. § 49-2825).

[102] *Id.* § 3-1-18-1 (Burns 1972).

[103] *Id.* § 17-4-36-2 (IND. ANN. STAT. § 49-3403, Burns 1964). State v. Clements, 215 Ind. 666, 22 N.E.2d 819 (1939); Wiltse v. Holt, 95 Ind. 469 (1884); Vandeveer v. Mattocks, 3 Ind. 479 (1852).

[104] IND. CODE § 17-4-36-5 (IND. ANN. STAT. § 49-3407, Burns 1964).

[105] *Id.* § 17-4-36-7 (IND. ANN. STAT. § 49-3409).

[106] IND. CONST. art. 6, § 6.

[107] *Id.* §§ 19-1-7-1, -7 (IND. ANN. STAT. §§ 48-6204, -6210, Burns 1963).

[108] *Id.* §§ 19-1-21-1, -3(b) (IND. ANN. STAT. §§ 48-6241, -3(b)).

[109] *Id.* §§ 19-1-29-1, -3(d) (IND. ANN. STAT. §§ 48-6250, -6252(d)).

[110] *Id.*

[111] *Id.* §§ 19-1-14-1, -6 (IND. ANN. STAT. §§ 48-6260, -6265).

[112] *Id.* § 18-1-11-2 (IND. ANN. STAT. § 48-6102).

[113] *Id.* § 19-1-34-1 (IND. ANN. STAT. § 48-6302).

[114] *Id.* §§ 18-2-1-1.5, 19-1-27-1 (IND. ANN. STAT. §§ 48-1201, -6157).

[115] *Id.* § 19-1-7-7 (IND. ANN. STAT. § 48-6210).

[116] *Id.* § 19-1-14-6 (IND. ANN. STAT. § 48-6265).

gan City, the appointment to chief can come from any rank,[117] as in most smaller cities.[118]

Promotion to any rank other than chief requires at least two years of continuous service with that city's police department immediately prior to promotion.[119] Under Indianapolis' merit system mental and physical qualifications, habits, conduct, service, and promotion school grades are considered in promotion selections.[120] In Indianapolis, the captain of traffic, the chief of detectives, and the inspectors of police are chosen by the Board of Public Safety upon nomination by the chief of police from the ranks of lieutenant or above.[121] Evansville and Michigan City have an elaborate statutory scheme for promotion. In rating for promotion purposes, the grade received on a written examination is fifty percent of the rating, past performance record is forty percent of the rating, and seniority is ten percent of the rating.[122] Promotions to any rank for detective candidates are made from the rank of corporal.[123]

Since promotion to an executive or managerial law enforcement position requires prior service with that law enforcement agency,[124] the fundamental screening takes place at the entry level. Employment for women at the entry level is outside the scope of this study but will be considered briefly since it is the first hurdle for would-be Indiana police executives and managers. Typically new appointees to large Indiana city police departments must meet residency, age, police record, education and various examination requirements.[125]

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[117] *Id.* § 19-1-29-3(d) (IND. ANN. STAT. § 48-6252(d)).

[118] *Id.* § 19-1-34-1 (IND. ANN. STAT. § 48-6302).

[119] *Id.* § 19-1-27-1 (IND. ANN. STAT. § 48-6157).

[120] *Id.* § 19-1-7-3 (IND. ANN. STAT. § 48-6206).

[121] *Id.* § 19-1-7-7 (IND. ANN. STAT. § 48-6210).

[122] *Id.* § 19-1-29-3 (IND. ANN. STAT. § 48-6252).

[123] *Id.* § 19-1-29-3(b)(3) (IND. ANN. STAT. § 48-6252(b)(3)). In Hammond, promotion is based upon seniority (40%), written examination (40%), past performance (10%), and personal interview (10%). *Id.* § 19-1-14-14 (IND. ANN. STAT. § 48-6273). Political affiliation is expressly irrelevant to the promotion decision. *Id.* § 19-1-14-17 (IND. ANN. STAT. § 48-6276).

[124] *Id.* § 19-1-27-1 (IND. ANN. STAT. § 48-6157).

[125] *E.g.*, *id.* §§ 19-1-2-1, -7-1, -21-4, -14-8, -29.5-1 (IND. ANN. STAT. §§ 48-6106, -6204, -6244, -6267, -6288, Burns Supp. 1974). Typically, prospective officers must: (1) reside in the city of which an appointee, (2) be between twenty-one or twenty-three and thirty-three years of age, (3) have no felony convictions, (4) be certified for participation in the pension plan, (5) pass a preliminary physical and aptitude examination, (6) successfully complete police candidates' school, and (7) pass an examination covering the police candidates' school plus physical condition, mental alertness, character, habits, reputation, aptitude and general fitness.

As early as 1905 Indiana statutorily provided for women in policing—at least as police matrons.[126] Police matrons' duties include the search and care of all women prisoners and children who are arrested and detained in jail or at the station house. Her duties also include attendance at proceedings involving women or children. Although the police matron has all the authority of a police officer, the qualifications for the position are unique:

> Such police matron shall not be under thirty-five (35) years of age, shall be fully qualified and shall be of good moral character. Before appointment, she must be recommended in writing by not less than twenty (20) women and five (5) men, all of whom shall have been residents of such city for at least five (5) years next previous to such appointment.[127]

In 1919 a statute was passed expressly empowering the Indianapolis Board of Safety to appoint women as regular members of the police force.[128] Moreover, the Indiana Supreme Court held in 1935 that a second class city board of public safety had the authority to appoint a woman to serve in a capacity other than a police matron.[129]

With the exception of the special situation of the police matron, statutory requirements for police applicants apparently do not discriminate against women and at least in one case expressly establish women as appropriate candidates. Similarly, there is no explicit sex discrimination in the qualifications for promotion to the various ranks, including that of chief. Further analysis of these laws will be found in the next section of this Article.

B. Court Officials

Indiana court officials—prosecutors, defense attorneys, and judges—are extremely powerful agents within the Indiana Criminal Justice System. Of course, these officials are lawyers, and the discrimination against women which has long pervaded the legal profession in this country[130] has had its effect on the role of women in the courts. Although women are entering Indiana law schools in record numbers, women law graduates who become criminal prosecutors, criminal defense attorneys, or criminal court judges

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[126] *Id.* § 18-1-11-17 (IND. ANN. STAT. § 48-6123, Burns 1963).

[127] *Id.*

[128] *Id.* § 19-1-17-1 (IND. ANN. STAT. § 48-6203).

[129] Snowden v. Stackert, 207 Ind. 442, 193 N.E. 586 (1935).

[130] Dinerman, *Sex Discrimination in the Legal Profession*, 55 A.B.A.J. 951 (1969); Kass, *A Woman's View of Law School*, 15 STUDENT L.J. 4 (1969); Sassower, *The Legal Profession and Women's Rights*, 25 RUTGERS L. REV. 54 (1970); White, *supra* note 43.

are still exceptionally rare.[131] Again this section will examine Indiana's laws to see if the reason lies there, looking at the qualifications for prosecutors, defense attorneys, and then judges at each political subdivisional level.

Women prosecutors are uncommon[132] and often are seen as appropriate primarily for cases involving crimes against women, particularly rape.[133] At the state level, the Indiana Attorney General represents Indiana in all criminal cases before the Indiana Supreme Court.[134] By statute, the Attorney General must be a citizen of Indiana, licensed to practice law in Indiana, and elected by Indiana voters.[135] The Attorney General can select and appoint Deputy Attorneys General who must be citizens of Indiana licensed to practice law in the state.[136] In each judicial circuit the voters elect a prosecuting attorney.[137] Prosecuting attorneys must have been admitted to the practice of law in Indiana prior to the election and must reside within their circuits.[138] The office is constitutional[139] and the prosecuting attorney can appoint deputies. As with the office of sheriff, women qualified to be Attorney General or prosecuting attorney must be elected. No woman in Indiana has ever met that test.

Another court-official position in the ICJS is the defense attorney. Any woman admitted to the Indiana Bar is a criminal defense attorney from that moment on if she wishes to be. Although several states, notably California and New York, are actively involved in specialization programs to certify only qualified attorneys as criminal law specialists,[140] Indiana still admits all

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[131]*See* Appendix.

[132]Apparently Monroe County has the only woman serving as the chief deputy to a county prosecutor in Indiana. *See* Ellett, *supra* note 7.

[133]*E.g., id.;* Bloomington Daily Herald-Telephone, Feb. 22, 1974, at 6, col. 1 (Female Prosecutors Get Rape Convictions).

[134]IND. CODE § 4-6-2-1 (Burns 1974); State v. Sopher, 157 Ind. 360, 61 N.E. 785 (1901); Stewart v. State, 24 Ind. 142 (1865).

[135]IND. CODE §§ 4-6-1-2, -3 (Burns 1974).

[136]*Id.* §§ 4-6-1-4, -5-1, -5-2, -5-6, -5-6-1-1.

[137]IND. CONST. art. 7, § 16; IND. CODE § 33-14-1-1 (IND. ANN. STAT. § 49-2501, Burns 1964).

[138]IND. CONST. art. 7, § 16; State *ex rel.* Indiana State Bar Ass'n v. Moritz, 244 Ind. 156, 191 N.E.2d 21 (1963); State *ex rel.* Howard v. Johnston, 101 Ind. 223 (1885).

[139]State *ex rel.* Neeriemer v. Daviess Circuit Court, 236 Ind. 624, 142 N.E.2d 626 (1957); State *ex rel.* Pitman v. Tucker, 46 Ind. 355 (1874).

[140]The United States District Court for the Southern District of New York is informally certifying lawyers considered eligible for appointment to defend accused persons under the Criminal Justice Act, and the State Bar of California issues certificates of specialization in criminal law. *See* Note, *Chief Justice Burger Proposes First Steps Toward Certification of Trial Advocacy Specialists*, 60 A.B.A.J. 17 (1974).

new lawyers to the general practice of law.[141] An applicant for admission to the Indiana Bar must (1) be at least twenty-one years of age; (2) be a citizen of the United States; (3) be of good moral character; (4) be a graduate of an approved law school; (5) successfully complete the bar examination; (6) be a bona fide resident of Indiana; and (7) have the intent to practice law in Indiana.[142] In addition, non-Indiana attorneys can be admitted on foreign license,[143] and occasionally applicants are admitted on motion without examination for military reasons.[144]

The Indiana Supreme Court appoints another important official in the ICJS, the State Public Defender, who must be an Indiana resident and a practicing lawyer for at least three years.[145] Circuit court judges of certain larger counties also have the authority to appoint public defenders,[146] request the State Public Defender to provide a defense,[147] or contract with a local attorney or attorneys to regularly provide for the defense of indigent accuseds.[148] A particularly interesting provision is relevant when the State Public Defender is requested by a circuit court judge to provide a defense for a particular case: the Public Defender may defend the case personally, assign a deputy, or appoint "any practicing attorney who is competent to practice law in criminal cases" to defend the case.[149] This is the only statutory reference to the notion that criminal defense work may be a recognizable specialty not held by all practicing attorneys in Indiana.

Thus, a woman could be a criminal defense attorney so long as she is admitted to the practice of law in Indiana and is selected by a criminal client or appointed by a judge. However, Indiana women lawyers are rare and Indiana women criminal defense lawyers are more uncommon still.[150] The one striking exception is Mrs. Harriette Bailey Conn, the present State Public Defender of Indiana.

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[141] IND. RULES OF PROC., Rule A.D. 3 (Burns Supp. 1974).

[142] *Id.*, Rules A.D. 13, 17, 21. Some of these requirements have been challenged as discriminatory on the basis of the equal protection clause, *e.g.*, *In re* Griffiths, 413 U.S. 717 (1973). However, there is no evidence to believe that these requirements have a disparate effect on women and should therefore be illegal on the basis of sex discrimination. For further discussion of the nature of the "disparate effect" argument, see text accompanying note 287 *infra*.

[143] IND. RULES OF PROC., Rule A.D. 6 (Burns Supp. 1974).

[144] *Id.*, Rule A.D. 19.

[145] IND. CODE § 33-1-7-1 (IND. ANN. STAT. § 13-1401, Burns 1956).

[146] *Id.* § 35-11-1-1 (IND. ANN. STAT. § 9-3501, Burns Supp. 1974).

[147] *Id.* § 33-9-11-1 (IND. ANN. STAT. § 9-3504).

[148] *Id.* § 33-9-10-1 (IND. ANN. STAT. § 9-3509).

[149] *Id.* § 33-9-11-2 (IND. ANN. STAT. § 9-3505).

[150] *See* Appendix.

Since courts are the center of the Indiana Criminal Justice System, the judges of those courts are powerful agents within that system. Women are infrequently judges[151] for many unarticulated reasons, but an analysis of Indiana's legal requirements for judges reveals no explicit bar to women. Qualifications for the judicial offices of the Indiana Supreme Court and Court of Appeals, circuit courts, superior courts, criminal courts, county courts, magistrates courts, city courts, and municipal courts—all of which are involved in the Indiana Criminal Justice System in varying degrees—are the next subject of examination. Since 1953 all Indiana judges at both the state and county levels must have been duly admitted to practice law in Indiana or have had previous experience as an Indiana judge.[152] Of course, if the judicial office is elective the prospective judge must meet the qualifications demanded by the voters. Beyond these general judicial qualifications, certain judicial offices may have specific requirements.

The Indiana Supreme Court has the power to review all questions of law in criminal cases and to review and revise sentences imposed.[153] Thus, justices of this court are professionals within the ICJS. The justices are nominated by the Judicial Nominating Commission,[154] appointed by the governor,[155] and then approved or rejected by the voters every ten years.[156] Constitutional requirements for nomination are United States citizenship and either admission to the practice of law in Indiana for not less than ten years or service as an Indiana county judge for at least five years.[157] Statutory criteria to be considered by the Commission include legal education, legal writings, reputation in the practice of law, physical condition, financial interest, public service activities, and any other pertinent information which the Commission feels is important in selecting the most highly qualified individuals for judicial office.[158] The Indiana Court of Appeals is also a

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[151]Scutt, *supra* note 7. Judge Sue Shields, Hamilton County Superior Court, is described as the highest woman judge in Indiana. *See* Appendix to identify the few women judges within the ICJS.

[152]IND. CODE § 33-13-9-1 (IND. ANN. STAT. § 4-6905, Burns 1968).

[153]IND. CONST. art. 7, § 4.

[154]*Id.*

[155]*Id.* art. 7, § 10.

[156]*Id.* art. 7, § 11.

[157]*Id.* art. 7, § 10.

[158]IND. CODE § 33-2.1-4-7 (IND. ANN. STAT. § 4-7807, Burns Supp. 1974) provides that the Commission shall consider the following specific criteria:

(1) Legal education, including law schools attended and post-law school education, and any other academic honors and awards achieved.

(2) Legal writings, including but not limited to legislative draftings, legal briefs, and contributions to legal journals and publications.

(3) Reputation in the practice of law, as evaluated by attorneys

part of the ICJS, since an absolute right of one appeal plus review and revision of sentences is provided in all criminal cases.[159] Constitutional requirements and statutory considerations[160] are the same for the judicial offices of the court of appeals as for the supreme court, with the additional requirement that court of appeals judges reside in the geographic district to which they are appointed.[161]

These qualifications indicate no express sex discrimination, unless "physical condition" or "any other pertinent information" are interpreted to allow consideration of the candidate's sex. Of course, the experience qualification may well have a discriminatory effect on women since, as mentioned above, comparatively few women have attended law school or accumulated extensive experience as trial lawyers or judges. As with law enforcement agencies,[162] Indiana's judicial system normally assumes entry at a lower level judicial office followed by several years of satisfactory service before "promotion" to the supreme court or the court of appeals. This factor cannot be ignored in its impact upon women candidates.

Indiana's circuit court judgeships are constitutional offices[163] with criminal jurisdiction.[164] Constitutional qualifications for the office are residence within the circuit and admission to the practice of law in Indiana.[165] Circuit court judges are elected by the voters of the circuit.[166] No other statutory qualifications exist for circuit court judges, again leaving broad discretion with the voters.

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and judges with whom the candidate has had professional contact, and the type of legal practice, including experience and reputation as a trial lawyer or trial judge.

(4) Physical condition, including general health, stamina, vigor and age.

(5) Financial interests, including any such interest which might conflict with the performance of judicial responsibilities.

(6) Activities in public service, including writings and speeches concerning public affairs and contemporary problems, and efforts and achievements in improving the administration of justice.

[159]IND. CONST. art. 7, § 6.

[160]*Id.* art. 7, § 10; IND. CODE § 33-2.1-4-7 (IND. ANN. STAT. § 4-7807, Burns Supp. 1974).

[161]IND. CONST. art. 7, § 10; IND. CODE § 33-2.1-2-3 (IND. ANN. STAT. § 4-7713, Burns Supp. 1974).

[162]*See* text accompanying notes 75-129 *supra.*

[163]IND. CONST. art. 7, § 1.

[164]*Id.* art. 7, § 8; IND. CODE § 33-4-4-3 (IND. ANN. STAT. § 4-303, Burns 1968).

[165]IND. CONST. art. 7, § 7.

[166]*Id.;* IND. CODE § 3-4-4-1 (Burns Supp. 1974). In Vanderburgh County, elections occur only after a rejection of the incumbent at the primary election. *Id.*

More populous counties in Indiana have superior courts,[167] typically with judges elected by the voters of that county.[168] In the counties of Allen,[169] Lake,[170] Saint Joseph,[171] and Vanderburgh,[172] superior court judges are appointed by the governor after nomination by the Judicial Nominating Commission. To be eligible for nomination, a person must be domiciled in the county, be a United States citizen, and be admitted to the practice of law in Indiana.[173] Eligible persons are evaluated by the Judicial Nominating Commission on statutory criteria similar to those employed in the selection of appellate court judges.[174] Political affiliations are ex-

[167] *E.g.*, IND. CODE § 33-5-10-1 (IND. ANN. STAT. § 4-801, Burns 1968) (Clark County Superior Court); *id.* § 33-5-8-1 (IND. ANN. STAT. § 4-601) (Bartholomew County Superior Court).

[168] *Id.* § 33-5-8-1 (IND. ANN. STAT. § 4-601) (Bartholomew County); *id.* § 33-5-9-1 (IND. ANN. STAT. § 4-701) (Boone County).

[169] IND. CODE §§ 33-5-5.1-30, -39, -41 (IND. ANN. STAT. §§ 4-530, -539, -541, Burns Supp. 1974).

[170] *Id.* §§ 33-5-39-28, -39 (IND. ANN. STAT. §§ 4-1928, -1939, Burns Supp. 1974).

[171] *Id.* §§ 33-5-40-33, -50, -44 (IND. ANN. STAT. §§ 4-2634, -2651, -2645).

[172] *Id.* §§ 33-5-43.5-3, -10, -12, -14 (IND. ANN. STAT. §§ 4-2995, -2995g, -2995i, -2995k).

[173] *Id.* §§ 33-5-5.1-38(a), -29.5-36(a), -40-41(a), -43.5-11(a) (IND. ANN. STAT. §§ 4-538(a), -1936(a), -2642(a), -2995h(a)).

[174] *Id.* §§ 33-5-5.1-38(b), -29.5-36(b), -40-41(b), -43.5-11(b) (IND. ANN. STAT. §§ 4-538(b), -1936(b), -2642(b), -2995h(b)) specify the following criteria.

> (1) Law school record, including any academic honors and achievements;
>
> (2) Contributions to scholarly journals and publications, legislative draftings, and legal briefs;
>
> (3) Activities in public service, including:
>
> (i) writing and speeches concerning public or civic affairs which are on public record, including but not limited to campaign speeches or writing, letters to newspapers, testimony before public agencies;
>
> (ii) government service;
>
> (iii) efforts and achievements in improving the administration of justice;
>
> (iv) other conduct relating to his profession.
>
> (4) Legal experience, including the number of years of practicing law, the kind of practice involved, and reputation as a trial lawyer or judge;
>
> (5) Probable judicial temperament;
>
> (6) Physical condition, including age, stamina, and possible habitual intemperance;
>
> (7) Personality traits, including the exercise of sound judgment, ability to compromise and conciliate, patience, decisiveness and dedication;
>
> (8) Membership on boards of directors, financial interest, and any other consideration which might create conflict of interest with a judicial office;

pressly exempted when considering eligible candidates for nomination.[175] Elected superior court judges are subject to the expectations of voters. The nomination and appointment procedure does provide express factors for consideration, none of which are expressly related to the sex of the candidate.

Marion County's Criminal Courts[176] and Hancock County's County Court[177] represent other county courts with criminal jurisdiction. As with most other county court judges, these offices are elective,[178] with no particular qualifications save admission to the practice of law in Indiana.[179] First, second, third, and fourth class cities have city courts[180] with criminal jurisdiction.[181] City court judges are elected by voters of the city[182] and typically must have been residents of the county in which the city is located for at least one year preceding the election.[183] Indianapolis has a municipal court[184] with criminal jurisdiction.[185] Municipal court judges are appointed by the governor after nomination by the Judicial Nominating Commission.[186] An eligible candidate must be admitted to the practice of law in Indiana, be a United States citizen, have been a practicing attorney or judge in Indiana for at least five years, and have been a resident and practicing attorney or judge in Marion County for at least the three years prior to appointment.[187] Of the fifteen municipal court judges, only eight can be affiliated with the same political party.[188]

No mention of sex is made in any of the express factors for consideration of candidates. Although not part of the criminal justice system, the Lake and Marion County juvenile court judges may appoint at least three referees, and in the event that such officials are appointed, one shall be a woman[189] in addition to

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(9) Any other pertinent information which the commission feels is important in selecting the best qualified individuals for judicial office.

[175] *Id.* §§ 33-5-5.1-38(d), -29.5-36(d), -40-41(d), -43.5-11(d) (IND. ANN. STAT. §§ 4-538(d), -1936(d), -2642(d), -2995h(d)).

[176] *Id.* § 33-9-1-1 (IND. ANN. STAT. § 4-5701, Burns 1968).

[177] *Id.* § 33-5.1-1-1 (IND. ANN. STAT. § 4-6401, Burns Supp. 1974).

[178] *Id.* §§ 33-5.5-1-1, -9-9-2 (IND. ANN. STAT. §§ 4-6401, -5725).

[179] *Id.* §§ 33-5.5-1-2, -13-9-1 (IND. ANN. STAT. §§ 4-6402, -6905, Burns 1968).

[180] *Id.* § 18-1-14-1 (IND. ANN. STAT. § 4-6001).

[181] *Id.* § 18-1-14-5 (IND. ANN. STAT. § 4-6002).

[182] *Id.*

[183] *E.g., id.* § 33-13-11-1 (IND. ANN. STAT. § 4-6017).

[184] *Id.* § 33-6-1-1 (IND. ANN. STAT. § 4-5801, Burns Supp. 1974).

[185] *Id.* § 33-6-1-2 (IND. ANN. STAT. § 4-5802).

[186] *Id.* § 33-6-1-12 (IND. ANN. STAT. § 4-5814).

[187] *Id.* § 33-6-1-30 (IND. ANN. STAT. § 4-5814(a)).

[188] *Id.*

[189] *Id.* § 33-12-2-17 (IND. ANN. STAT. § 9-3116).

being a United States citizen and a practicing attorney for a period of three years.[190] However, the sex of a candidate for judge of a court with criminal jurisdiction is not an express factor to be found within the laws of Indiana.

C. Correction Officials

The qualifications for executive, managerial, and professional positions within the ICJS corrections subsystem are much more explicit and detailed than for similar positions in other ICJS subsystems. The Indiana Department of Correction[191] controls most of this correctional subsystem in the typical modes of probation, parole, and institutionalization. High educational achievement and several years of experience are typically required for upper level positions. Consideration turns first to the various managerial and executive positions within the Department of Correction, then to the officers of the various correctional institutions, and finally to probation and parole officers.

1. Department of Correction Officials

The Board of Correction[192] determines department policy[193] and is composed of seven members, including a practicing attorney, a social worker or sociologist, an educator, a psychologist or psychiatrist, someone familiar with the problems of juveniles, and two lay members.[194] Board members are appointed by the governor,[195] may not be officials of the state in any other capacity, and must be "qualified for their position by demonstrated interest in and knowledge of correctional treatment."[196] No more than four out of seven of the board members may belong to the same political party.[197]

The Commissioner of the Department of Correction is its executive and administrative head.[198] Appointed by the governor,[199] the Commissioner must meet combined requirements of education and managerial and correctional experience[200] which are

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[190] *Id.*

[191] *Id.* §§ 11-1-1.1-1, -3 (Burns 1973).

[192] *Id.* § 11-1-1.1-4.

[193] *Id.* § 11-1-1.1-7.

[194] *Id.* § 11-1-1.1-6.

[195] *Id.* § 11-1-1.1-5.

[196] *Id.* § 11-1-1.1-4.

[197] *Id.* § 11-1-1.1-5.

[198] *Id.* § 11-1-1.1-9.

[199] *Id.* § 11-1-1.1-11.

[200] *Id.* § 11-1-1.1-12 provides that the Superintendent must meet the following specific criteria.

common to most of the executive and managerial positions within Indiana's Department of Correction.

The Executive Officer of the Department is chosen by the Commissioner subject to the approval of the Board of Correction.[201] Also chosen in this way are the Executive Director of Adult Authority, who has direct supervision of the heads of adult correctional institutions,[202] and the Executive Director of Youth Authority who has direct supervision of the heads of juvenile or youthful offender institutions.[203] To be eligible for these positions candidates must (1) "have . . . graduated with a bachelor's degree from an accredited college or university, and preferably be the recipient of an earned graduate degree" and (2) "have had eight years full-time paid experience in a correctional system, [at least five of which] must have been in a responsible supervisory or administrative capacity."[204] Graduate training in any behavioral science, administration, or other field appropriate to correctional work may be substituted on a year-for-year basis for general experience, not to exceed two years.[205] The Department's Division of Probation exercises general supervision over the administration of probation in all Indiana courts and is headed by a Director.[206] The Director is employed by the Commissioner with the Board's approval, is directly responsible to the Director of Adult Authority, and must possess the same qualifications as the executive directors, except that only three years of supervisory or administrative experience are required.[207] The Director of the Department's Division of Classification and Treatment,[208] employed by the Commissioner and approved by the Board, must be "qualified by training and experience to organize and direct

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(1) He shall have been graduated with a bachelor's degree from an accredited college or university and preferably be the recipient of an earned graduate degree;
(2) He shall have had responsible administrative or supervisory experience in a correctional system for a minimum of five (5) years;
(3) He shall have had ten (10) years full-time paid experience in correctional institutional work, parole, probation or social work;
(4) Graduate training in any behavioral science, administration or other fields appropriate to correctional administration work may be substituted on a year-for-year basis for general experience not to exceed three (3) years.

[201] *Id.* § 11-1-1.1-15.
[202] *Id.* § 11-1-1.1-16.
[203] *Id.* § 11-1-1.1-17.
[204] *Id.* § 11-1-1.1-49.
[205] *Id.*
[206] *Id.* § 11-1-1.1-18.
[207] *Id.* § 11-1-1.1-19. For further discussion of probation positions see text accompanying note 275 *infra*.
[208] IND. CODE § 11-1-1.1-24 (Burns 1973).

programs of classification, general and vocational education and other programs of treatment and training designed to promote the rehabilitation of offenders."[209] Other specific qualifications for this directorship are provided by statute.[210]

The qualifications for the Director of Industries and Farms,[211] also chosen by the Commissioner with Board approval, are tailored to the unique duties of the position.[212] The Division of Medical Care and Treatment must be headed by a licensed physician "qualified by training and experience to supervise and direct the medical care and treatment of the inmates."[213] This division director must also be appointed by the Commissioner and approved by the Board of Correction.[214] The Director of the Division of Research and Statistics must be "qualified to organize and direct a staff of professional, technical, and clerical personnel engaged in collecting, recording, analyzing, interpreting, and presenting statistical and research data."[215] Additional specific qualifications for this directorship, reflecting the unique duties of the position,

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[209] *Id.* § 11-1-1.1-25.

[210] *Id.* The statute provides that:

> (1) He shall have been graduated with a bachelor's degree in any behavioral science from an accredited college or university and preferably be the recipient of an earned graduate degree;
>
> (2) He shall have had eight (8) years full-time paid experience in correctional institutional work, parole, probation, social work, or related fields;
>
> (3) Five (5) of these years shall have been full-time paid work in a correctional system, three (3) of which shall have been in a responsible supervisory or administrative capacity. Graduate training in education or any behavioral science may be substituted on a year-for-year basis for general experience, not to exceed three (3) years.

Note the specific requirement for behavioral science education and the more liberal policy in substituting graduate education for general experience.

[211] *Id.* § 11-1-1.1-36.

[212] *Id.* § 11-1-1.1-37 provides:

> (1) He shall have been graduated with a bachelor's degree in business administration, accounting, industrial management or a suitable equivalent, and preferably be the recipient of an earned graduate degree;
>
> (2) He shall have had six (6) years full-time paid experience in industrial sales or production, three (3) years of which shall have been in a responsible administrative or supervisory capacity.

Note the fixed requirement for work experience without provision for substitution of graduate education.

[213] *Id.* § 11-1-1.1-30.5.

[214] *Id.*

[215] *Id.* § 11-1-1.1-33.

are statutory.[216] The Director of the Division of Administrative Services[217] is employed by the Commissioner with approval by the Board. Qualifications for this position are also set by statute.[218]

The last division with duties relevant to the Indiana Criminal Justice System is the Adult Parole Division within the Adult Authority.[219] The Supervisor of the Adult Parole Division is directly responsible to the Executive Director of the Adult Authority.[220] The Supervisor of the Adult Parole Division, as well as the Director of Work Release,[221] must meet the same general qualifications as the executive directors of the Adult Authority and the Juvenile Authority.[222]

2. Institutional Officers

The Indiana Youth Center, a medium-security institution for first offender male felons between the ages of fifteen and twenty-

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(1) He shall have been graduated with a master's degree from an accredited college or university and preferably be the recipient of an earned doctor's degree;

(2) He shall have had five (5) years of research or statistical related work experience;

(3) His academic and experimental background should suggest an extensive knowledge of theory and methods of statistical research and analyses, sources of potential data and methods of presentation, as well as a demonstrated ability to design and conduct basic research. Graduate training in any behavioral science, administration, or statistics may be substituted on a year-for-year basis for the required work experience, not to exceed two (2) years.

Id.

[217] *Id.* § 11-1-1.1-34.

[218] *Id.* § 11-1-1.1-35.

(1) He shall have been graduated with a bachelor's degree in business administration, accounting, or a suitable equivalent, from an accredited college or university and preferably be the recipient of an earned graduate degree;

(2) He shall have had eight (8) years of full-time paid experience above the clerical level in a public or private agency or business organization in accounting, budgeting, auditing, purchasing, institutional administration, or personnel management. Three (3) of these eight (8) years shall have been in a responsible administrative or supervisory capacity.

(3) Graduate training in business or a related area may be substituted on a year-for-year basis for general experience not to exceed three (3) years.

[219] *Id.* § 11-1-1.1-54.

[220] *Id.*

[221] *Id.* § 11-1-1.1-47.

[222] *Id.* § 11-1-1.1-49. For further discussion of parole positions, see text accompanying note 281 *infra*.

five,[223] except those sentenced to death or life imprisonment,[224] is a part of the ICJS correctional subsystem. The Superintendent of the Center is employed by the Commissioner with approval by the Board, subject to the statutory mandate that such employment be on the basis of merit only and "without regard to race, sex, color, creed, place of national origin, or political affiliation."[225] Express qualifications for the position are the same as those for the executive directors.[226]

The Reception and Diagnostic Center,[227] which is part of the Indiana Youth Center, processes various classes of felons and recommends the most appropriate correctional institution and the type of program of correction and training for each offender.[228] The Center is administered by a director who is appointed by the Board of Correction and who must have been trained in and have had experience in the field of penology and correction, including at least three years of satisfactory administrative experience in such field.[229] The Center's Classification Board evaluates the diagnostic report and then recommends the institution and program to the Board of Correction which makes the final decision.[230] Members of the Classification Board are selected by the Board of Correction[231] with no specific qualifications expressed in the statutes.

The Youth Rehabilitation Facility[232] operates conservation work camps[233] on state property[234] with custody of males not over twenty-five years of age[235] transferred to the facility by the Board of Correction from another institution.[236] The Director of the Youth Rehabilitation Facility is appointed by the Board.[237] He must have the same qualifications as the executive directors.[238] The Rockville Training Center is a minimum security institu-

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[223] IND. CODE §§ 11-1-2-9, -3-6-1 (Burns 1973).

[224] *Id.* § 11-3-6-1.

[225] *Id.* § 11-1-1.1-48.

[226] *Id.* § 11-1-1.1-49.

[227] *Id.* § 11-3-6-5.

[228] *Id.* § 11-3-6-10.

[229] *Id.* § 11-3-6-5. The statute also provides that the director have graduated from an accredited college or university and during his college or university training have majored in the field of education or social sciences.

[230] *Id.* § 11-3-6-10.

[231] *Id.*

[232] *Id.* § 11-3-5-1.

[233] *Id.* § 11-3-5-2.

[234] *Id.* § 11-3-5-4.

[235] *Id.* § 11-3-5-2.

[236] *Id.* § 11-3-5-6.

[237] *Id.* § 11-3-5-3.

[238] *Id.* § 11-1-1.1-49.

tion[239] for males fifteen to twenty-five years old who have not previously been convicted of a felony, except those sentenced to life imprisonment or death.[240] The Superintendent of the Rockville Training Center is appointed by the Commissioner of the Department of Correction with the recommendation of the Indiana Youth Authority's Advisory Council.[241] By statute the Superintendent must be a graduate of an accredited college or university and have had six years of experience in correctional institutional work, parole, probation or social work, four of which shall have been in a correctional system. Of the latter four years, three must have been in a responsible supervisory or administrative position in a correctional institution.[242]

The Department of Correction may establish and operate community correctional centers as part of the state correctional system.[243] Superintendents of such centers are appointed by the Commissioner with approval of the Board.[244] As with all superintendents of the various other correctional institutions, employment is on the basis of merit without regard to race, sex, color, creed, place of national origin, or political affiliation.[245] Educational and experience qualifications are the same as those for the executive directors.[246]

The ICJS has four other correctional institutions for boys and male adults. The Indiana State Prison incarcerates males convicted of treason or murder in the first or second degree, all convicted male felons thirty years of age or older, and all males transferred thereto.[247] The warden of the prison is employed by the Commissioner, with approval by the Board of Correction,[248] on the basis of merit only and without regard to race, sex, color, creed, place of national origin, or political affiliation.[249] The Indiana Reformatory incarcerates males between the ages of sixteen and twenty-nine who are convicted of felonies other than treason or murder in the first or second degree.[250] The Indiana

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[239] *Id.* § 11-3-7-2.

[240] *Id.* §§ 11-1-2-9, -3-7-1.

[241] *Id.* §§ 11-1-2-11, -1-2-12, -3-7-3.

[242] *Id.* § 11-3-7-3. The statute provides that graduate training in any behavioral science, administrative or other field, appropriate to correctional work, may be substituted on a year-for-year basis, not to exceed two (2) years.

[243] *Id.* § 11-1-5-1.

[244] *Id.* § 11-1-5-4.

[245] *Id.* § 11-1-1.1-48.

[246] *Id.* § 11-1-1.1-49.

[247] *Id.* § 11-2-3-2.

[248] *Id.* § 11-1-1.1-47.

[249] *Id.* § 11-1-1.1-48.

[250] *Id.* § 11-2-3-1.

State Farm[251] is charged with custody of males over eighteen years of age.[252] The Indiana Boys School[253] accepts commitment of boys between twelve and eighteen years of age[254] and confines them until they reach the age of twenty-one unless released sooner.[255] The qualifications for the Warden of the State Prison and the superintendents of the three latter institutions are the same as those for the executive directors.[256]

Two correctional facilities for girls and women exist in Indiana, the Indiana Women's Prison,[257] which incarcerates women over eighteen[258] who are convicted of criminal offenses and sentenced to imprisonment,[259] and the Indiana Girls School,[260] which accepts commitment of girls between twelve and eighteen years of age and confines them until they reach the age of twenty unless released sooner.[261] The qualifications for the superintendents of both institutions are the same as for the executive directors.[262] Counties may certify homes for friendless women,[263] but no statutory mention is made of qualifications of supervisors.

Additionally each county in Indiana is required to maintain a county prison or jail[264] under the direction of a county sheriff.[265] The grand jury, at each term of the circuit court, inspects the county jail and reports complaints or recommendations to the county's board of commissioners.[266] The Indiana Department of Correction formulates and prescribes rules and regulations for county jails to be adopted and enforced by the circuit court.[267] Counties may also establish and maintain a county workhouse.[268] If established, the workhouse is to be managed by a superintendent, who must be "some proper person" employed by the county board of commissioners.[269]

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[251] *Id.*

[252] *Id.* §§ 11-2-5-4, -3-1-2.

[253] *Id.* §§ 11-3-1-1, -3-1.

[254] *Id.* §§ 11-3-1-2, -1-3, -1-4, -2-3.

[255] *Id.* §§ 11-3-1-8, -2-8, -4-2.

[256] *Id.* §§ 11-1-1.1-48, -49.

[257] *Id.* § 11-4-1-1.

[258] *Id.* §§ 11-4-5-1, -4-7-3.

[259] *Id.* § 11-7-3-2.

[260] *Id.* § 11-4-1-1.

[261] *Id.* § 11-4-5-1.

[262] *Id.* §§ 11-1-1.1-48, -49.

[263] *Id.* § 11-4-8-1.

[264] *Id.* § 11-5-1-1.

[265] *Id.* § 11-5-1-3. The qualifications for sheriff are discussed in the text accompanying note 93 *supra.*

[266] IND. CODE § 11-5-1-2 (Burns 1973).

[267] *Id.* § 11-5-3-2.

[268] *Id.* § 11-6-1-1.

[269] *Id.* § 11-6-1-2.

Qualifications for police matrons have been earlier mentioned but the position is more properly placed in the correctional subsystem. The prison matron is appointed by the county sheriff[270] and must be "at least twenty-one years of age, able bodied, fully qualified and of good moral character."[271] Although no direct qualification of female sex can be found in the statutes, the repeated use of pronouns "her" and "she,"[272] the term "matron," and the comparison of prison matrons to women officials in other institutions[273] indicate that the legislature assumed that the prison matron would be a woman. Indeed if the county has no police matron, it must still employ a person

> to receive, take charge of, search, and properly care for, at the county jail, city prison or other detention centers within the county, all female prisoners and all children under the age of fourteen (14) years, who have been arrested and detained in the county jail, city prison, or other detention centers.[274]

3. Probation and Parole Officers

Probation officers are appointed by and serve under the judges of circuit courts, criminal courts, city courts, and municipal courts.[275] The Division of Probation of the Department of Correction prescribes minimum standards for the operation of probation practices, selection of probation personnel, and establishment of salary levels.[276] More precisely, a probation practices and standards committee[277] prepares minimum qualifications for entering probation work.[278] Members of the committee are appointed by the Director of the Division of Probation and the committee must consist of two judges with juvenile jurisdiction, one chief probation officer with administrative responsibility for an adult probation department, one chief probation officer with administrative responsibility for a juvenile probation department, and one probation officer from an adult probation department.[279] To be eligible for appointment as probation officers, candidates

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[270] *Id.* § 11-5-4-6.

[271] *Id.* § 11-5-4-5.

[272] *Id.* §§ 11-5-4-1 to -6.

[273] *Id.* § 11-5-4-7.

[274] *Id.* § 11-5-4-1.

[275] *E.g.*, *id.* §§ 35-7-2-3, -2-6, -3-1 (IND. ANN. STAT. §§ 9-2212, Burns Supp. 1974, -2214a, Burns 1956, -2214b, Burns Supp. 1974); Noble County Council v. Fifer, 234 Ind. 172, 125 N.E.2d 709 (1955).

[276] IND. CODE § 35-7-5.1-5 (IND. ANN. STAT. § 9-2919, Burns Supp. 1974).

[277] *Id.* § 35-7-5.1-6 (IND. ANN. STAT. § 9-2920).

[278] *Id.* § 35-7-5.1-7 (IND. ANN. STAT. § 9-2921).

[279] *Id.* § 35-7-5.1-6 (IND. ANN. STAT. § 29-2920).

must meet the minimum qualifications established by the probation practices and standards committee and successfully complete a competitive examination conducted by the Division of Probation.[280]

The Adult Parole Division maintains a staff of parole officers for parolees from adult institutions, employed "only on the basis of merit."[281] Thus, parole agents work for the Indiana Department of Correction and are employed through the merit system for state employees. These probation and parole positions are particularly important since they may serve as entry level jobs for women seeking employment in corrections. It should be noted that these positions do have a substantial number of women as compared to other ICJS positions.[282]

IV. Discrimination in ICJS Employment

With the preceding exposition of statutory qualifications for various ICJS executive, managerial, and professional positions as a foundation, this section now examines those qualifications for implicit discriminatory effect. While it appears that none of these statutes expressly prohibit or hinder women from serving in those positions, some of the requirements may implicitly discriminate against women. Furthermore, implicit employment discrimination against women in a subtle, personal mode may be discerned. In sum, the authors believe that women have been discriminated against in the employment of ICJS executives, managers, and professionals—not formally through statutory qualifications but rather by subtle and informal beliefs and judgments. This section will describe a few of the ways in which this discrimination may occur.

In applying federal and state employment statutes to specific positions in the ICJS, it is apparent that almost all of the positions in this study are covered by each of the laws. At the law enforcement level all line officers are covered except elected sheriffs who are exempt.[283] While it might be argued that the chief of police could be included under the relatively recent "policy

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[280] *Id.* § 11-1-1.1-20 (Burns 1973).

[281] *Id.* § 11-1-1.1-56.

[282] *See* Appendix.

[283] *See* note 54 *supra*. However, neither Executive Order 11,246 nor the Indiana Civil Rights Law specifically exempts elected officials or their staff. While the employer of an elected official may be the electorate, which is not mandated to avoid discrimination, the personal staff of such as elected official would seem to be covered. Thus the distinction drawn in this section would be applicable only if Title VII was the sole law relevant to a particular case. Since Title VII is the most pervasive and well-known, most of our comments will be directed toward its coverage, language, and judicial interpretation.

maker" exemption of Title VII,[284] the exemption is, by its language, directed toward members of a politician's personal staff and should not be read to include the chief of police. In the court officials section of the ICJS the county prosecuting attorney is exempt from Title VII since the office is elective; however, problems arise as to the status of the position of deputy prosecuting attorney. On the one hand, a deputy could arguably be considered "an appointee on the policy making level" with respect to important decisions about tactics or decisions as to whether to prosecute various kinds of cases. On the other hand, to accept such an argument in this instance could lead to an unwarranted enlargement of the exemption since almost all employees must make decisions which ultimately affect his or her employer's policies. The exemption should be narrowly construed. For example, in counties with rather large staffs in the prosecutor's office, the chief deputy may be directly involved with policy decisions and thus be exempt; however, other deputies with lesser responsibilities would not come within the exemption. At the state level, a similar analysis could be made with respect to the Attorney General's staff. Obviously, there is nothing to prevent the state, county, prosecuting attorney, or Attorney General from pursuing an equal opportunity program; the question is whether or not it is mandatory.

ICJS judges are both appointed and elected. While elected judges are exempt, appointed judges are not and are therefore "employees" under Title VII. Likewise, the public defender and staff are included in the coverage of Title VII. The catch-all category of practicing attorneys is covered at three levels: the law schools' responsibilities, the state bar's testing and admissions programs, and law firms' employment and promotion practices.

Finally, the positions in the corrections field discussed in this Article are all covered by the equal opportunity laws. As with line officers in law enforcement, equal employment opportunity for these positions is crucial since promotion to top executive and administrative jobs is dependent upon experience at lower levels.[285]

Given the applicability of equal opportunity laws to most positions in the ICJS, the relevant case law should be of interest to those charged with employment decisions. Although there are very few cases which raise direct questions about employment of

[284]Fair Labor Standards Amendments of 1974, Act of April 8, 1974, Pub. L. No. 93-259, § 6(a)(2), U.S. Code Cong. & Adm. News 619 (1974), *amending* 29 U.S.C. §§ 201-19 (1970).

[285]*See* text accompanying note 124 *supra*.

women in criminal justice positions,[286] there are several which are applicable to women and employment in any field. Often these cases deal with the issues of seemingly neutral standards, except in cases of explicitly separate job lines. The concept of unlawful discrimination implicit in neutral standards is crucial to understanding employment in the ICJS, since the exclusion of women is not by formal or overt decisions.

One neutral standards issue involves the legality of height and weight requirements imposed for law enforcement officers and sometimes informally for persons at correction institutions.[287] Although height and weight requirements are neutral on their faces and do not explicitly exclude women, the effect of such requirements may have a discriminatory impact which also violates equal employment opportunity policy. For example, if a law enforcement agency has a height requirement of 5 feet 9 inches for

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[286]In addition to cases discussed here, several cases have been filed alleging general sex discrimination. The Suffolk County Police Department has been charged by the National Organization for Women with discrimination in recruiting, testing, hiring, and promotion and in terms, conditions and privileges of employment. SPOKESWOMAN, Mar. 15, 1964, at 3. The Justice Department has filed suit against the Chicago and Buffalo, N.Y., municipal police departments, alleging discrimination against women in employment opportunities and conditions of employment. LEAA Newsletter, November 1973, at 24.

In City of Philadelphia v. Pennsylvania Human Relations Comm'n, 4 Pa. Commw. 506, 287 A.2d 703 (1972), a trial court decision for the woman plaintiff who had been denied the opportunity to apply for a job with the park police was reversed. The court ruled she must first apply to be a regular police officer and hinted separate job lines—policewoman-policeman—would be subject to challenge. Apparently park patrol was considered to be a *policeman's* job.

In Wood v. Mills, 6 Fair Empl. Prac. Cas. 1347 (S.D.W. Va. 1973), the court upheld an "equal pay" complaint by a woman deputy sheriff (jail matron) who was paid less than a male jailor. An injunction against further differentiation issued but the court denied any back pay award.

There are also a few cases involving procedural issues. Wright v. Nichols, 7 Fair Empl. Prac. Cas. 196 (E.D. Mich. 1973) (class action, section 1983 challenge survived motion to dismiss even though named plaintiff resigned); O'Brien v. Shrimp, 356 F. Supp. 1259 (N.D. Ill. 1973) (section 1983 cause of action stated when sheriff refused to consider women for position of deputy sheriff).

[287]Although not found in Indiana statutes, height and weight requirements are commonly used by ICJS law enforcement components. *See e.g.*, Bloomington Daily Herald-Telephone, June 20, 1973, at 2, col. 1 (emphasis added):

> The Indiana State Police have announced that applications are now being accepted from *men* who want to become troopers. . . . Applicants must be U.S. citizens, age 21 to 34, height *5 feet 9 inches* to *6 feet 5 inches* . . . .

See note 81 *supra*.

all police officers, the fact that promotions are always from within, coupled with the fact that approximately ninety-five percent of the female population falls below 5 feet 9 inches,[288] means that women are effectively excluded from pursuing careers in law enforcement. That a height standard is neutral on its face is irrelevant to equal opportunity laws since its effect is exclusion and discrimination.

One of the Supreme Court's first Title VII cases, *Griggs v. Duke Power Co.*,[289] involved the legality of seemingly neutral job requirements. The plaintiff in *Griggs* alleged that the employer violated Title VII by requiring a high school diploma and a satisfactory intelligence test score for certain jobs. In reversing the lower court, which had found no impermissible discrimination, the Supreme Court held that both the diploma and test score standards violated Title VII since neither was shown to be significantly job related. The Court rested its decision upon a finding that both requirements operated to disqualify Negroes at a substantially higher rate than white applicants. Thus the *Griggs* test provides that once a plaintiff has established that a pre-employment standard has a "disparate effect" on a Title VII protected group, the burden of proof shifts to the defendant employer to show that the standard is job related. In order for the employer to satisfy the job related standard, he or she must prove that the requirement substantially increases the likelihood of success on the particular job. Obviously, in order to predict the chances of success on a job, one must know what the job requires, how success is to be measured, and what qualities are needed for successful job performance. This proof must be specific and not based on general allegations of the test's ability to improve the overall quality of the work force[290] or upon general notions of stereotyped abilities or characteristics.[291] Correspondingly, the issue in height and weight requirement cases is whether or not

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[288]Note, *Height Standards in Police Employment and the Question of Sex Discrimination: The Availability of Two Defenses for a Neutral Employment Policy Found Discriminatory Under Title* VII, 47 S. CAL. L. REV. 585, 588 n.13 (1974) [hereinafter cited as *Height Standards*]; Smith v. City of East Cleveland, 363 F. Supp. 1131, 1136 (N.D. Ohio 1973).

[289]401 U.S. 424 (1971).

[290]*Id.* at 431.

[291]*See* Smith v. City of East Cleveland, 363 F. Supp. 1131, 1137 (N.D. Ohio 1973); 29 C.F.R. § 1604.2 (1973); *Height Standards, supra* note 288, at 603-05.

they are job related.[292] This question was directly faced in *Smith v. City of East Cleveland.*[293]

Smith involved a black woman plaintiff who brought a class action suit under 42 U.S.C. § 1983[294] challenging various aspects of police hiring including a height and weight minimum of 5 feet 8 inches and 150 pounds. After considering evidence for fifteen days, the court carefully detailed its conclusion that the skills, defined in relation to the police function, were not positively related to the height and weight requirements presently imposed but rather were based solely on the stereotype of the large male police officer.[295] The defendants argued that the most physically taxing and dangerous of the police duties, the felony related functions, required physical strength, fitness, and agility, long reach of the arms, as well as the abilities to view crowds, drive a car, absorb blows, and impress others with physical prowess.[296] The court carefully analyzed each function as it related to the height and weight minimums and perceived no relationship. For example, the court found that in most cases the kind of physical strength required of a police officer was leverage strength—the use of body mass at a particular angle in order to lift or direct—rather than brute strength—from mass alone. Since leverage strength, which is the preferred method of exercising force as a police officer,[297] has little to do with height and weight but depends rather on conditioning and fitness,[298] the requirements were found discriminatory because they failed to meet the job related test.

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[292]There have been occasional lapses of proof on the plaintiff's side in neglecting specific allegations and illustrations of the disparate effect. *See* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). However, the statistics are available. Secondly, there are evidentiary problems involving statistical methods to determine what percentage of exclusion violates Title VII. For a thorough analysis see *Height Standards, supra* note 288, at 596-602.

[293]363 F. Supp. 1131 (N.D. Ohio 1973).

[294]Alleging violation of her fourteenth amendment rights, the plaintiff did not use Title VII. The court's standard of review was basically constitutional, inquiring as to whether the requirements of height and weight were rationally related to a valid state interest under the recent holdings of Frontiero v. Richardson, 411 U.S. 677 (1973), and Reed v. Reed, 404 U.S. 71 (1971), which the court found in this case to mean that the 5 foot 8 inch and 150 pound minimums must be demonstrably related to job performance. 363 F. Supp. at 1136-38.

[295]363 F. Supp. at 1138.

[296]*Id.* at 1141.

[297]*Id.* at 1139. Brute force is more likely to result in injury to the officer and the person restrained.

[298]*Id.* at 1138-39. In fact where there is a relationship between height and leverage strength it is negative, that is, the taller person is at a disadvantage because of less effective leverage.

Another example of the court's inquiry was its evaluation of the police department's most crucial argument: the unmeasurable advantage of height in its ability to impress others. The police department considered the advantage of its requirement to be the psychological impact of having all officers over 5 feet 8 inches. The department theorized that if an officer were taller than the person being controlled or arrested, the shorter person would be deterred from assaulting the officer by his or her apparent physical superiority. According to the court the facts offered by the department did not substantiate these claims and in fact indicated size was no deterrence.[299] Although *Smith* is not the only case[300] which deals directly with height and weight requirements for law enforcement officials, it closely follows the reasoning and standards of proof these issues raise in other areas.[301] Because of its careful analysis, *Smith* deserves special attention.

Another issue which often arises in employment discrimination cases which are applicable to women in the ICJS involves pregnancy and maternity leaves. Discrimination on the basis of pregnancy or childbearing is clearly discrimination based on sex since only women can become pregnant and bear children.[302] Al-

[299] *Id.* at 1140.

[300] *Contra*, Hardy v. Stumpf, 4 Fair Empl. Prac. Cas. 1078 (Cal. Sup. Ct. Alameda County 1972), in which the court held all requirements, including height and weight, were not unreasonable and were directly and reasonably connected and necessary to the normal performance of duties of police patrolmen. However, the invaluable detail and analysis of *Smith* is not evidenced in *Hardy*. Therefore, the authors believe *Hardy* is subject to attack for failure to review stereotyped rationalization for classifications based on sex. Apparently the police force in *Hardy* was segregated. *See* text accompanying note 327 *infra*.

[301] *See* EEOC Decision No. 74-25, Sept. 10, 1973, in 2 CCH EMPL. PRAC. GUIDE ¶ 6400 (municipal fire department's 5 foot 7 inch minimum held illegal under Title VII); Dominquez v. Board of Fire & Police Comm'rs, in 2 CCH EMPL. PRAC. GUIDE ¶ 5199 (1973) (Illinois Fair Employment Practice Commission held police department's 5 foot 8 inch height minimum illegal under state act); Pa. Att'y Gen. Op. No. 57, in 2 CCH EMPL. PRAC. GUIDE ¶ 5177 (1973) (state police 5 foot 6 inch minimum suspended until demonstrated to be job related); Moore v. City of Des Moines Police Dep't, in 2 CCH EMPL. PRAC. GUIDE ¶ 5184 (July 11, 1973) (Iowa Civil Rights Commission held police department's 5 foot 9 inch height minimum illegal under state act); EEOC Decision No. 72-0284, Aug. 9, 1971, in CCH EEOC Decisions ¶ 6304 (1973) (5 foot 6 inch minimum for airline flight purser violated Title VII); EEOC Decision No. 71-2643, June 25, 1971, in CCH EEOC Decisions ¶ 6286 (1973) (employer's 5 foot 7 inch minimum violated Title VII); EEOC Decision No. 71-1529, April 2, 1971, in CCH EEOC Decisions ¶ 6231 (1973) (employer's 5 foot 7 inch minimum violated Title VII); EEOC Decision No. 71-1418, Mar. 17, 1971, in CCH EEOC Decisions ¶ 6223 (1973) (5 foot 5 inch factory worker requirement invalid).

[302] *See* LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972), *aff'd*, 414 U.S. 632 (1974); Hutchison v. Lake Oswego School Dist. No. 7,

though the specific employment requirements in the ICJS do not deal with pregnancy or leaves, the question of how to deal with pregnant women workers is invariably raised in a discussion of the general characteristics and problems of women workers. In fact, it often appears that this one distinctive biological feature of women is uppermost in employers' minds. Given traditional attitudes about women and "their proper place" it is not surprising that once a woman becomes pregnant the conflict between home and work is resolved by the *employer* in favor of the former. What is surprising is that women are often penalized or considered unqualified because they *might* become pregnant.[303] For example, it is not inconceivable that an employer would argue that a woman does not fulfill the "general physical fitness" requirement of some criminal justice positions[304] since she may become pregnant. However, to deny a woman a job on this basis is clearly unacceptable and illegal unless the employer also denies jobs to men who *may* become temporarily disabled.[305]

In 1972 the Equal Employment Opportunity Commission issued new guidelines which deal with fringe benefits as well as pregnancy and childbirth.[306] The provisions state that a refusal

Civil No. 73-339 (D. Ore., Apr. 25, 1974). *Contra,* Cohen v. Chesterfield County Bd. of Educ., 474 F.2d 395 (4th Cir. 1973) (en banc), *rev'd,* 414 U.S. 632 (1974). *But see* Geduldig v. Aiello, 94 S. Ct. 2485 (1974).

[303]T. HAYDEN, PUNISHING PREGNANCY: DISCRIMINATION IN EDUCATION, EMPLOYMENT, AND CREDIT 1 (ACLU Reports 1973), a comprehensive pre-*LaFleur* case study of pregnancy and employment policies.

[304]*See* text accompanying notes 125 (police officers), 153 (candidates for supreme court and court of appeals), and 174 (candidates for superior court judge) *supra.*

[305]Of course, the problem is even more crucial when a woman applicant or candidate is already pregnant. Most employers refuse to consider such an applicant; the question is whether or not the employer also never considers men with present, temporary disabilities, such as a hernia. *See* T. HAYDEN, *supra* note 303, at 58.

[306]29 C.F.R. § 1604.10 (1973) provides:

> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

to hire an applicant because of pregnancy violates Title VII and may be justified only under the bona fide occupational qualification exception. They further provide that pregnancy is to be treated as any other temporary disability is treated by the employer and thus in most cases a paid leave of limited but adequate duration must be available.[307] The authors suggest that discussion concerning whether pregnancy is properly defined as an illness, whether it is voluntary, or whether a pregnant worker will defraud her employer is irrelevant and useless. If an employer has a policy which covers its employees' temporary physical conditions, such a policy should be extended to the physical condition of pregnancy. Although these guidelines have not, as yet, been subject to Supreme Court challenge,[308] they were recognized in the latest relevant Court case.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

Id. § 1604.9 provides in part:

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave, and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

. . .

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no benefits.

(e) It shall not be a defense under title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

[307] *See, e.g.*, Hutchison v. Lake Oswego School Dist. No. 7, Civil No. 73-339 (D. Ore., Apr. 25, 1974); T. HAYDEN, *supra* note 303, at 58. One woman police officer is suing the Chicago Police Department for back pay withheld during her pregnancy. Bloomington Daily Herald-Telephone, Jan. 10, 1974, at 5, col. 1.

[308] There have been lower court challenges in which the guidelines were upheld and applied. *See* Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146 (W.D. Pa. 1974).

In *Cleveland Board of Education v. LaFleur*,[309] the Court struck down mandatory maternity leave policies for public school teachers in two school districts as violative of the teachers' fourteenth amendment due process rights.[310] Although the nature of the leave policies varied in the cases before the Court, as had policies subject to earlier lower court decisions,[311] both provided a mandatory leave for a specified number of months, without pay, and with little job security. What is relevant for the purposes of this Article is that the Court found administrative convenience unacceptable as a basis for so dealing with pregnant employees. Such a view should likewise be adopted by ICJS employers. They should trade in their stereotyped notions about pregnant workers, and women generally because of their possibilities of becoming pregnant, and replace them with individual determinations. The fact of pregnancy or even the presence of children should not in itself disqualify a woman from any position in the ICJS.[312]

A third instance of a seemingly neutral ICJS employment requirement which may be unlawfully discriminatory involves educational requirements. Although most cases which have held educational requirements illegal unless specifically validated have involved race, it may be possible to find sex discrimination if one sex has been substantially excluded, formally or informally, from the required educational experience. For example, in the court officials positions in the ICJS, lawyer status is almost always a prerequisite, yet in the past women have been effectively excluded from law schools and thus comprise only three percent of the lawyers in this country.[313] The resolution of a potential

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[309]414 U.S. 632 (1974).

[310]The Court did not decide whether the leave should be paid. It should be remembered that these cases were brought before the public educational employees amendment to Title VII and thus relied upon the Constitution for jurisdictional basis. Therefore, the specific issue of Title VII and its guidelines was not decided, although obviously the Court recognized the analogous nature of its opinion. *See id.* at 638-39 n.8.

[311]*See, e.g.*, Bravo v. Board of Educ., 345 F. Supp. 155 (N.D. Ill. 1972); Health v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972); Williams v. San Francisco United School Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Sinks v. Mays, 332 F. Supp. 254 (N.D. Ga. 1971). For other examples of different policies, *see* T. HAYDEN, *supra* note 303, at 37-38.

[312]One highlighting example to illustrate the opposite point of view is found in T. HAYDEN, *supra* note 303, at 28:

> A senior portfolio analyst at Merrill, Lynch, Pierce, Fenner and Smith reports that she was told by her supervisor (a woman) that she must take maternity leave, as coming to work in a maternity dress would be like coming to work in dungarees, a "blemish upon the department." You cannot perform in a man's job while acting like a woman.

[313]*See* White, *supra* note 43, at 1051.

charge of sex discrimination is not to eliminate the requirement that to be qualified for a job one must be a lawyer but rather for the employer to establish that lawyer status is job related. That is, an employer should prove that a court official's job is performed significantly better by a lawyer. If this standard can be met there will be no violation of Title VII or any other equal employment legislation. However, there may yet be a need to establish an "affirmative action" policy[314] to encourage more women, if that is the underrepresented sex, and it is in this example, to enter law school, the necessary prerequisite to becoming a lawyer. Without this second step the relative position of women in the system would be excruciatingly slow to change. The other step, admission to the bar, must also be a sex-less process and its job-relatedness should also be specifically established.[315]

Another form of the discriminatory use of educational requirements is to be found in the employment of informal standards in hiring practices. For example, an employer may formally require as a minimum that all persons have a high school diploma but informally never consider a woman with less than a college degree.[316] Obviously, such a procedure is illegal, but its opponents may face an evidentially difficult burden of proof. Related to the problem of educational qualifications are work experience requirements which, although neutral on their faces, can result in discrimination. Again, the principles in this area have come from cases involving race,[317] but they are applicable as well to sex, and the reasoning that should be followed is similar to that used above in analyzing the effect of educational requirements. A key example of this potential problem in the ICJS is in the field of corrections. To varying degrees, professionals in the corrections subsystem of the ICJS must meet a minimum educational requirement and have had a certain specified number of years of experience in corrections work. This experience may be gained by work in correctional institutions, in parole, probation, or social work, or by experience in a related field.[318] Additionally,

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[314]For further development of affirmative action requirements and legal bases, see text accompanying note 339 *infra*.

[315]For a critique of typical bar examinations, *see* Bell, *Do Bar Examinations Serve a Useful Purpose?*, 57 A.B.A.J. 1215 (1971).

[316]Such informal discrimination is reflected in admission standards in the military. Ginsburg, *The Need for the Equal Rights Amendment*, 59 A.B.A.J. 1013, 1018 (1973).

[317]*E.g.*, United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); *cf.*, Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968). *See also Developments*, *supra* note 52, at 1145-50.

[318]*See* notes 200, 210, and 242 & accompanying text *supra*.

a certain minimum number of years must be in positions administrative in nature.[319] Although neutral on its face, this work experience requirement may have a disparate effect on women if they have been effectively excluded from the fields considered preparatory. In Indiana several women have positions in probation, parole, or social work,[320] but few have administrative positions and thus could not qualify. Again, the next step is to establish the job related character of these requirements and, even if successfully shown, encourage development of affirmative action policies to substantially increase the pool of available women. This same work experience argument can be applied to the entry level police office position since it also qualifies persons for administrative and professional positions in the field of law enforcement.[321]

A fourth area of pre-employment inquiry is testing. There has been considerable literature concerning culturally biased testing which adversely affects Blacks and other minorities,[322] but there have also been occasional allegations of cultural biases adversely affecting women.[323] Specifically, in the ICJS, tests are used for various law enforcement positions, both at the entry level and for promotions.[324] It is essential that these tests be legally and psychologically valid once it is shown that members of a protected group score significantly and disproportionately lower than others. This disparate effect is most common in aptitude or general intelligence tests commonly used for law enforcement posions. Such tests have rarely been validated.[325] The validation

[319] *Id.*

[320] The chart appended to this Article reveals approximately fifty-seven women in ICJS probation and parole work.

[321] *See* notes 120, 122, and 125 & accompanying text *supra.*

[322] The most exhaustive article is Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969). *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971); E. GHISELLI, THE VALIDITY OF OCCUPATIONAL APTITUDE TESTS (1966); R. KIRPATRICK, TESTING AND FAIR EMPLOYMENT (1968); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (1968); *Developments*, *supra* note 52, at 1120-40.

[323] In Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973), the court did not rule on the allegation that promotion tests discriminated against women since too few women had taken the test. *See also* Murray, *Sex Discrimination and a Legal Education*, 22 BRIEF/CASE 7, 8 (Dec. 1972).

[324] *See* notes 118, 120, 122, and 125 *supra.*

[325] *See* Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973) (police); Officers for Justice v. Civil Service Comm'n, 371 F. Supp. 1328 (N.D. Cal. 1973) (police); Fowler v. Schwarzwalder, 351 F. Supp. 721 (D. Minn. 1972) (fire); Pennsylvania v. O'Neill, 348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd in relevant part by an equally divided court*, 473 F.2d 1029 (3d Cir. 1973) (en banc) (police).

procedure to be followed is essentially the same utilized in evaluating any other apparently neutral requirement, with special attention given to proper job analysis, which more effectively enables the testmaker to determine what to test for.[326]

Another problem which has arisen in other law enforcement agencies is the use of separate job lines and thus separate lines of promotion. For example, there may be police*man* and police*woman* positions, open only to men and women respectively, which involve different kinds of tasks.[327] The legal issues involved are not the rationality of separate job classifications or whether their use is a good management technique, but rather the exclusion of one sex from a particular job and the present effect of this past exclusion once the lines are sexually or racially integrated.[328] Obviously, since the effective date of Title VII and other equal employment opportunity statutes and regulations, an applicant may not be denied a job on the basis of sex, unless the employer establishes a bfoq exception. Since it is unlikely that a bfoq exception could be established for law enforcement positions[329] or for court and correction officials, sex-segregated job lines must be abolished. The next step is to deal with the present effect of past exclusion, an issue which arises in determining promotion qualifications. For instance, if four years of experience at the patrol entry level is required in order to qualify to take the sergeant's exam, does four years of experience as a "policewoman" count? Although this question has been answered variously in cases involving women police,[330] industrial cases dealing with previously discrimi-

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[326]Cooper & Sobol, *supra* note 322, at 1665-69.

[327]*E.g.*, this separation appears typical in New York. *See* Button v. Rockefeller, 6 Fair Empl. Prac. Cas. 588 (N.Y. Sup. Ct. Albany County 1973), and cases cited in note 330 *infra*.

[328]*See* Equal Employment Opportunity Comm'n, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.3 (1973).

[329]*Height Standards*, *supra* note 288, at 621.

[330]In Shpritzer v. Sang, 17 App. Div. 2d 285, 234 N.Y.S.2d 285 (1962), the court ruled the woman plaintiff qualified to take the sergeant's exam even though the duties of a policewoman and policeman differed. The primary force behind the court's decision, it appears, was the desire to avoid constitutional questions. *But see* Berni v. Leonard, 69 Misc. 2d 935, 331 N.Y.S.2d 193 (Sup. Ct.), *aff'd*, 40 App. Div. 2d 701, 336 N.Y.S.2d 620 (1972), *aff'd*, 32 N.Y.2d 933, 300 N.E.2d 734, 347 N.Y.S.2d 198, *cert. denied*, 94 S. Ct. 551 (1973), which held that one could not take the sergeant's exam until the applicant had served four years as a patrolman. The question of whether a woman could be come a "patrolman" was left unresolved as an issue not before the court.

It is the authors' contention that the *Berni* case is wrong and in fact the question of whether the qualifying job was open to women was essential to the resolution of the case.

natory seniority systems are basically consistent.[331] Typically "plantwide" or "employer" seniority is used for those employees affected by a previously discriminatory system.[332] However, new employees, hired into desegregated positions, are given job seniority and are promoted on the same basis as other employees. For the most part, the issue of present effects of past discrimination is one affecting only a small number of employees but for whom a remedy, carefully and narrowly defined, is essential.

One final issue, which must be raised involves the use of and reliance on "reputation" or personal references as a job requirement. Although references are commonly requested for most jobs, there is particular mention of this requirement in Indiana for judicial positions filled by persons nominated by the Judicial Nominating Commission.[333] In general, requests for references or evaluations of reputation in determining whether to hire a particular person are perfectly lawful and indeed a sensible policy since presumably the more information an employer has about a person the better the decision-making process. However, the subjective nature of these evaluations should be recognized and taken into account when weighing their value.

In some cases the references may be used in order to further a nepotistic-like policy.[334] If a disparate effect can be shown because of a nepotistic or extreme anti-nepotistic policy, the courts have not hesitated to abolish the requirement since nepotism is in no way job-related.[335] In other cases stereotyped characterizations constitute the problem. Since bias has not been eliminated from society, it is possible to foresee a situation in which a woman or a Black does not have a reputation or references equal to a white man simply because of the lesser values which some members of society place upon a woman's achievements.[336] Once again,

[331] *E.g.*, in Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), a sex separate seniority system was ruled a violation of Title VII. Racially segregated systems have also been ruled illegal. Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[332] *See* Cooper & Sobol, *supra* note 322, at 1615-36; *Developments*, *supra* note 52, at 1158-64; and cases cited in note 331 *supra*.

[333] *See* text accompanying note 158 *supra*.

[334] *Developments*, *supra* note 52, at 1150.

[335] Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Ironworkers Local 86, 315 F. Supp. 1202 (W.D. Utah 1970).

Anti-nepotism policies, particularly at universities, which have an adverse effect on women are suspect. See U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, OFFICE FOR CIVIL RIGHTS, HIGHER EDUCATION GUIDELINES, EXECUTIVE ORDER 11246, at 8 (1972).

[336] "'The men at the top replicate themselves . . . affinity is all-school affinity, industrial affinity, club affinity, social class and economic affinity.

the solution is not to eliminate the requirement of references or the evaluation of reputation but rather to be cognizant of the potential discrimination.

The issues which arise in evaluating employment practices are many and varied.[337] Some present subjective problems difficult to resolve speedily, while others are only problems until employers are conscious of the discrimination. Title VII and other equal opportunity laws and regulations require a great deal from employers. They are forced to evaluate all tests and other standards employed, since all such devices and criteria are presumed illegal, *i.e.*, discriminatory, until proven lawful, *i.e.*, validated. Furthermore, employers are mandated to examine their entire employment process which amounts even at best to educated guessing. However, viewed from a different perspective, these laws do encourage employers to make employment decisions on as rational a basis as possible. Their aim is to force employers to review their employment policies to insure that decisions are made on the basis of individual capacities and capabilities rather than on stereotyped images and characteristics. Although the legal mandate may appear unwarranted to those who feel the goals are impossible, it is the authors' belief that the goals are feasible and, in fact, will result in a more effective and responsive criminal justice system. However, the process will require a revision of the system's perceptions as to who is qualified. Within the ICJS one should not hear the following:

> One personnel chief summed up the [Wall] Street's anti-woman version of Catch 22 by saying, "You can't be feminine in this business [stock market]. We're looking for people who must excel, must win. They must be very competitive and have strong egos. The popular con-

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Women are commonly seen as outsiders.'" Whol, *What's So Rare as a Woman on Wall Street*, 1 Ms. 82, 127 (June 1973). *See also* Murray, *supra* note 323, at 8-9; Equal Employment Opportunity Comm'n, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(1) (1973).

[337]A different kind of problem can be seen in the suitation described in Wohl, *supra* note 336, at 127: Merrill Lynch, a prominent stock-brokerage firm, has only 150 women among 5,200 brokers because of the lack of "qualified women." Merrill Lynch seeks "winners" and believes "'the true winner seldom has a wife who works, for his ego requires that he be the full suport of the family.'" And a personality test given to all Merrill Lynch applicants asks whether the candidate objects to "your wife working outside the home." Obviously a woman cannot be a "winner" on that question. Moreover, men who need dependent wives as ego props are unlikely to view the few women who do get hired as equals. They would hardly be likely even to view the woman applicant as qualified.

ception is that women who have these qualities are neurotic. Who wants to hire a neurotic woman?"[338]

V. Recommended ICJS Affirmative Action Plan

In the previous sections of this Article, the authors have asserted their belief that women are discriminated against in the employment of ICJS executives, managers, and professionals, and have detailed a few of the ways in which this discrimination has been effected. This section describes affirmative action programs needed to counteract this situation. All ICJS employers should develop and adopt affirmative action plans. These plans must be tailored to particular employment situations and, thus, although it is possible for the state, the counties, the cities, and the towns to adopt system-wide affirmative action programs to cover all their respective employees, it is suggested that further refinement is required within each unit in order to facilitate specific but consistent programs.[339]

Affirmative action programs are designed to effectuate equal employment opportunity policies as expressed in various laws and regulations. Such programs reduce reliance on a case-to-case basis for enforcement, provide faster, more effective relief to affected employees or potential employees, and generally make equal opportunity a reality, not simply rhetoric. They key to an affirmative action program is its mandate of a continuing program of employer self-evaluation. Plans are written on the basis of an employer's own requirements, policies, and collected data. Affirmative action obligations are twofold. First, an employer must eliminate all present discriminatory practices and conditions. That is achieved by complying with present equal opportunity laws. Secondly, an employer must take further affirmative steps to increase minority group and female participation in the particular work force. This latter obligation is analogous to a remedy, for it seeks to overcome the present effects of past discrimination. Thus, a plan is designed to aid not only future or potential employees but also present employees. The suggested adoption of such plans has a firm foundation; they are required by law.

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[338]Wohl, *supra* note 336, at 127. Note the confusion of woman and feminine.

[339]Obviously excluded from any criminal justice system affirmative action plan are elected officials, such as prosecutors, sheriffs, and judges. This exclusion does not, however, indicate any opinion for or against these offices remaining elective.

A more specific delegation is also apparent in the Law Enforcement Assistance Administration's equal opportunity guidelines, 28 C.F.R. § 42.301 (1973), discussed at note 342 *infra*.

The authority for requiring affirmative action plans by ICJS employers comes from several sources. Of primary importance is Executive Order 11,246,[340] which prohibits certain federal contractors from discriminating against an employee or applicant on the basis of sex, as well as race, religion, or national origin. The Order also requires employers to take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, sex, religion, or national origin. The Secretary of Labor is designated as the administrator of these programs but may delegate this responsibility to other agencies.[341] In 1973 the Law Enforcement Assistance Administration (LEAA) of the United States Department of Justice issued specific guidelines requiring an "Equal Opportunity Program" relating to employment practices affecting minority group persons and women from each LEAA assistance recipient which has fifty or more employees and has received grants in excess of $25,000.[342]

Authority for affirmative action plans also comes from the remedy provisions of Title VII of the Civil Rights Act of 1964. Often, before entering into a conciliation agreement with an employer charged with a violation, the Equal Employment Opportunity Commission will require an affirmative action plan.[343] In addition, the Act itself gives the federal courts broad remedial powers, including ordering "such affirmative action as may be appropriate."[344] If an employer has an implemented affirmative action plan, the likelihood of conciliation with the EEOC and of relatively minor, if any, damage awards in court increases.

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[340]3 C.F.R. 169 (1974), 42 U.S.C. § 2000e (1970).

[341]For example, the Department of Health, Education, and Welfare has responsibility for educational institutions and hospitals. The Department of Treasury has responsibility for banks and other lending institutions.

[342]Law Enforcement Assistance Administration Guidelines, 28 C.F.R. § 42.301 (1973). The guidelines include the further requirement that the "recipient" be located in a geographic area where the available minority workforce is three percent or more of the total workforce. *Id.* § 42.302(b). It is unclear whether a written plan would be required under these guidelines if the minority population in a given area was below three percent but the female population was significant. One could argue a plan is necessary since the employer engages in separate analyses of each.

It is also possible for an affirmative action plan to be required under other regulations even though a unit may not be covered under LEAA.

[343]42 U.S.C. § 2000e-5(b) (Supp. III, 1973).

[344]*Id.* § 2000e-5(g). Such remedies have been ordered in several police and fire departments for minorities. *See* Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333 (2d Cir. 1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972).

Apart from the legal considerations involved in the implementation of affirmative action programs are the practical benefits that will flow to an ICJS employer. One immediate result of a viable plan will be an increase in the total number of persons in the applicant pool, thus broadening the base from which employees come. Additional applicants will afford the employer more alternatives and increase the likelihood of finding desirable employees. The reevaluation of employment techniques such a program entails will also promote better selection practices within the system. For example, if a pre-employment or promotion test has not been validated, it may not be furnishing the employer with any useful information. Test administration is time consuming and expensive; if a test has no predictive value, then both the time and money expended have been wasted. In fact, such a test or other nonvalidated pre-employment inquiry may well cost the employer qualified employees.[345] In short, because an affirmative action plan requires a systematic review of all terms and conditions of employment, policies and practices will be examined for their effectiveness, a valuable objective regardless of equal opportunity demands.

The specifics of an affirmative action plan can be quite complex; however, detailed guidelines from appropriate agencies are available.[346] Basic to all affirmative action plans is an evaluation of the employer's present work force, including the total number of employees in each position as well as the number of women and minorities in each. Further, all recruitment and selection procedures should be examined, and an analysis made by race, sex, and national origin of the number of persons applying for employment, accepting employment, applying for promotion, receiving promotion, and terminating, both voluntarily and involuntarily. Finally, information should be gathered to determine the community and area labor force characteristics, *e.g.*, total population, work force population, existing unemployment, all with information as to sex, race, and national origin. For example, if a city police department recruits city-wide, county-wide, or region-wide, labor force characteristics from that area are needed. Additionally, if an employer requires certain educational achieve-

[345]Recent research indicates policemen are typically ranked higher in categories such as "strong" and "aggressive" while policewomen are thought to be more "understanding" and "compassionate." P. BLOCH & D. ANDERSON, *supra* note 5, at 10. However, women police executives as a group may exhibit more strength in leadership-associated personality traits than do male police executives as a group. Price, *A Study of Leadership Strength of Female Police Executives*, 2 J. POL. SCI. & ADMIN. 219 (1974).

[346]*See* note 342 *supra;* 41 C.F.R. § 60-2 (1973).

ments for employees, as do many in the ICJS, those people with the appropriate training need to be ascertained.

Once these data have been collected, areas of disproportionate employment are easily detected. It then becomes the obligation of the employer to examine those areas of disproportion to determine if the employment of women and minorities is inhibited by any internal or external factor. If so, the employer must set about to remedy the situation. Secondly, once the data is known, the employer can establish goals and timetables which reflect his or her decision as to how many women and minority employees are an adequate balance and predict when these goals will likely be reached. Finally, a plan should also indicate what positive steps an employer plans to take to achieve these self-imposed goals.[347]

At this point, it should be emphasized that it is an essential characteristic of the 1970's affirmative action plans that the goals and timetables are determined internally by individual employers and not imposed externally by governmental agencies. Secondly, since the employment problems for women and minorities differ substantially, there should be a separate analysis and a separate response for women and for minorities. In the past the typical problem in terms of employment for women has been underutilization; for minorities, cultural biases are usually the key.

As with any recommendation, there are criticisms of affirmative action which need to be explored. First, an issue exists as to whether "goals" is a euphemism for "quotas." All official literature carefully avoids the use of "quota," but often employers act as if any distinction is only one of semantics. However, in a legal sense there is a difference between goals and quotas, although both can take the form of concrete numbers. For example, a county probation department may set its employment goal at three women and three men officers when its present composition is one woman and five men. It is later unable to attain its goal as a result of having only one vacancy or because after extending offers to several women, none accept due to locale, social factors, etc. Such a situation would not be a violation, since the department could establish its good faith efforts in pursuing its affirmative action program. On the other hand, quotas are neither flexible nor subject to a "good faith" defense. The assumption that goals and quotas are identical can in fact have detrimental effects for both employees and employers. Quotas en-

[347]As indicated above, all terms and conditions of employment as well as recruitment are covered by an affirmative action plan. For example, plans include analysis of grievance procedures, maternity leaves, testing, and pay. See also the discussion of legal issues in text accompanying notes 283-388 *supra*.

courage employers to hire by sex, race, or national origin alone—according to body, not ability. Thus, there is in quotas the danger of hiring unsuitable people who then become dissatisfied employees because they cannot, for whatever reason, do the job.

This idea that affirmative action will result in a lower quality of employees forms a second criticism. As indicated above, correctly written affirmative action plans take into account valid qualifications. In fact, affirmative action can have the reverse effect and raise employee quality, since there is an expanded pool from which to draw. In assessing this criticism one should not overlook the troublesome nature of the concept of "quality" itself. That is, how is "quality" to be determined and how can it be freed from sex-based notions.

A third criticism of affirmative action is that it is unfair to white males and thus illegal and undesirable as reverse discrimination.[348] First, once an affirmative action plan is in effect, there is nothing to prevent an employer from hiring a white male, but the deck may no longer be stacked in his favor. Secondly, to hire or to promote only on the basis of sex—either sex—is unlawful.[349] Reverse discrimination is discrimination. Finally, it is possible that in the past some unqualified people were hired or promoted. To the extent that is true, the adoption of affirmative action may have an adverse impact on these types of people.

Once an affirmative action plan is adopted, it is important that it be communicated and explained to all employees. In order to deal with the inevitable anxieties of present employees, the person responsible for equal opportunity must be given sufficient authority. Furthermore, compliance with the plan by employees should be recognized in any reward system of the employer as is any other action which promotes the agency. Although initially an affirmative action plan results in considerable expenditures of

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[348]The legality of a more strict affirmative action plan was upheld in Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) (Philadelphia Plan with specific ranges imposed by the government). A modern test did not yield a definitive result in DeFunis v. Odegaard, 94 S. Ct. 1704 (1974). However, many commentators see Justice Douglas' dissent as predictive.

For a discussion of the constitutionality of affirmative action plans, see Getman, *The Emerging Principles of Sexual Equality*, 1972 SUP. CT. REV. 157, 166-73 (1972); *Developments*, *supra* note 52, at 1279-80.

[349]A common misunderstanding is that "sex" means "woman" and "race" means "Black." It is true that affirmative action policies are a response to particular problems, primarily underutilization of women and minorities in the work force. However, discrimination against a man because of his sex or against a caucasian because of race is illegal. There seems little likelihood that employers will only hire women and Blacks once one examines the progress of equal employment during the last ten years.

administrative time, the monitoring, once established, becomes institutionalized and less time consuming. Some day the need for this particular remedy will dissipate. However, for the moment its benefits outweigh any anxieties.

VI. Summary and Conclusions

Women are increasingly seeking executive, managerial, and professional positions in business, industry, government, and academia as well as almost any other area imaginable. Traditionally, they have been explicitly denied these positions on the basis of their sex and the commonly-held stereotyped notions about their sex. In the past decade, explicit sex discrimination in employment has faded because of an adverse legal environment, a revitalized women's movement, and a recognized need to identify the highest qualified prospective employees. However, in many instances sex discrimination continues, changing only from overt to covert tactics. Moreover, the bases of this discrimination, stereotyped notions and attitudes, remain in the minds of many employers.

The authors submit that employment in the ICJS is not unlike employment in other fields. Although express requirements for executive, managerial, and professional ICJS positions do not refer to the sex of candidates, the educational, physical, health, work experience, testing, and general reputation requirements can covertly discriminate against women candidates. Further, it is suspected that criminal justice systems are bastions of classic male chauvinism which operate in a variety of unspoken ways to effectively exclude women executives, managers, and professionals.

It is most strongly recommended that all ICJS agencies develop and implement affirmative action programs, so clearly needed by the society it serves and so clearly commanded by the legal environment in which it operates. As a legal system, it is most prudent for the ICJS to comply with the law. As a system operated by people with financial support from the general public, the ICJS has an undeniable need for the best people available to fill its positions of responsibility and trust. Moreover, since the ICJS asks the society it serves to have respect for law and agents of the law, the ICJS should serve as a model of legal propriety. Affirmative action programs, coupled with candid, honest evaluations of present agency attitudes and policies, are steps in the right direction.

Appendix

Indiana (State)

Law Enforcement

State Police: 872 police officers
total women 0
601 troopers
271 above rank of trooper

District level (20)
Typical district has:
1 District Commander (Lt.)
1 Exec. Officer (1st Sgt.)
2 Line command Sgt.
3 Detective Sgts.
4 + other sgts. (administrative)
troopers

State level
1 Superintendent
4 Executive Officer (Lt. Col.)
9 Division Heads (Majors)
e.g.: records, investigations, logistics
Section (within each division) (Lt./Sgts.)

Lawyers/Courts

Attorney General (1)
Chief Deputies (3)
Assistant Attorney General (12)
Deputy Attorney General (49)/4W

Public Defender
Public Defenders (1W)
Assistant Public Defender (1)
Deputy Public Defender (6)

Courts: Courts of Appeals — (9)
Supreme Court — (5)

Corrections

Dept. of Corrections:
Administration
Total 17
men 16
unfilled 1

Parole:
Ind. Parole Board
Total (5)
Adult Parole Division, Parole Officers total 37/1W

Institutions:
State Prison (2)
Warden, Bus. Admin.
Reformatory (2)
Superintendent, Bus. Admin.
Ind. State Farm (2)
Superintendent, Bus. Admin.
Women's Prison
Superintendent (1W)
Bus. Admin. (1M)
Parole Board (4W)
Reception Diagnostic Center (2)
Director, Bus. Admin.
Indpls. Work Release Center (2)
Director, Bus. Admin.
(excludes juvenile systems)

County, City or Town(a)	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police:(b) Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prose-cuting Attny.	Dep. or Asst.	Public Defender	Dep.	(c) Private Attnys	Court (Judges)	Probation Officers	Dep.	(d) Jailers and Matrons	Dep. or Asst.
									(e)										
ADAMS CO.								(1)	X	(1)				(22) (2W)	1 Cir.	X			
Cities: (2988)(f)		1 asst																	
Berne (1570)	(1)	chief					(1)			(1)					--				
(8445)																			
Decatur (4395)	(1)				(3)		(8)			(1)					(1)				
Towns: (1100)																			
Geneve (584)								--											
(622)																			
Monroe								(1)											
		(1)								(1)(1)ch					(1)Cir.	(1)admn.(8)	P.O.-1W	(4)metrons	
		1					(79)			dep. (4		(1) 3		(359)	(6)Sup.	(1)admn.(1)	spec.sup.		
ALLEN CO.		major	(4)	(5)	(14)		(1W)	(1)		invst.)	(10)	invest-gr.	(7)	(9W)		(1)intake sup.1W	15 P.O.-5W		
Cities: (177,671)																			
(92,895)							(215)								--				
Ft. Wayne (5,728)	(1)	(5)	(10)	(16)	(66)		(7W)			(1)									
(2,945)															--				
New Haven (688)	(1)		(1)	(1)			(4)			(1)									
Woodburn	X									(1)					--				
Towns: (570)																			
Grabill								(1)											
(775)																			
Huntertown								(1)											
(1353)																			
(720)								pt. time											
Monroeville								(1)											
		2 ma-					(15) FT(g)			(1)(1)				(57)	(1)Cir.	(1)PO (1)	Asst.-1W		
BARTHOLEMEW CO.		jors					spec.	(1)	(4)	invetg.	(1)	(1)		(2W)	(1)Sup.			(5)(2W)	
(27,141)																			
Cities: (14,268)		(1)																	
Columbus	(1)	asst.	(4)	(4)	(14)		(28)			(1)					(1)				
(275)																			
Clifford								(1)											
(4906)																			
(2521)																			
Edinburg	(1)		(1)		(1)		(4)												
(519)																			
Elizebethtown								(1)											
(434)																			
Harteville								(1)											
(1603)																			
(844)																			
Hope								(1)	(1)										
(202)																			
Jonesville								--											
BENTON CO.:								(1)	(1)	(1)				(81)	(1)Cir.	(1 W)		(1 W)	
(300)																			
Towns:																			
Ambia								(1)											
(998)																			
Boswell								(1)											
(478)																			
Carl Park								--											
(2643)																			
(1407)									(3)+										
Fowler								(1)	2 PT										
(899)																			
Otterbein								--											
(1098)																			
Oxford								(1)											
BLACKFORD CO.:								(1)	(1)	(1)				(8)	(1)Cir.	(1)		(1 W)	
(3465)																			
Cities: (1828)																			
Dunkirk	See Jay Co.																		
(8251)																			
(4331)																			
Hartford City	X									(1)					(1)				
(2093)																			
(1087)																			
Montpelier	(1)						(2)			(1)					(1)				
														(28)	(1)Cir.				
BOONE CO.:								(1)	(4)	(1)				(1W)	(1)Sup.	(1)		(1W)	(1W)
City: (9766)																			
(5212)																			
Lebanon	(1)		(3)	(2)	(3)		(6)			(1)					(1)				
Towns: (561)																			
Advance								(1)											
(938)																			
Jamestown								(1)	(4)										
(1399)																			
(728)																			
Thorntown								(1)							(1)				
(138)																			
Ulen								--							--				
(569)																			
Whiteestown								(1)							(1)				
(1857)																			
(1004)																			
Zionsville								(1)							(1)				

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Police: Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys.	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
BROWN CO.:								(1)	X	(1)				(10) (2W)	(1) Cir.	X			
Town: (527) Nashville								(1)											
CARROLL CO.:								(1)	X	(1)				(15) (1W)	(1) Cir.	X			
City: (2582) Delphi (1373)	X									(1)					(1)				
Towns: (685) Burlington								(1)											
(577) Camden								(1)											
(1877) Flora (1001)								(1)											
(145) Yeoman								(1)											
CASS CO.:								(1)	(4) (1W) off. dep.	(1)				(25) (2W)	(1) Cir.	(1)		(1W) (1 asst., W)	
City: (19,255) (10,254) Logansport	(1)	(1) detective		(5)	(10) Corp. & Radio		(5)			(1)					(1)				
Town: (672) Galveston (1284)								(1)											
(111) Onward								(1)											
(987) Royal Center								(1)											
(1054) (575) Walton								(1)											
CLARK CO.:		(1)	(1)	(1)	(1)		(9)	(1)		(1) & (2) investg.	(2)	(1)	(1)	(58) (2W)	(1) Cir. (1) Sup.	Sup.Ct. (1) dep. (1) chief		(2W)	
Cities: (5890) (3050) Charlestown	X									(1)					(1W)				
(20,008) (10,635) Jeffersonville	(1) (1) asst.	(4)		(5)	(4)		(3) Corpl. (15)			(1)					(1)				
Towns: (13,806) (7121) Clarksville								(1) (Ch. P.)							(1)				
(337) New Providence								(1)											
(3177) (1608) Sellersburg	(1)		(1)		(1)		(4)												
CLAY CO.:								(1)	X	(1)				(12)	(1) Cir.	X			
Cities: (8163) Brazil (4444)	X									(1)					--				
Towns: (344) Carbon								--											
(275) Center Point								--											
(900) Clay City								(1)											
(788) Knightsville								(1)											
(582) Staunton								(1W)											
CLINTON CO.:								(1)	X	(1)				(28) (1W)	(1) Cir.	X			
City: (14,956) (18,045) Frankfort	(1)	(1)	(1)	(3)	(3)		(12)			(1)					(1)				
(633) Colfax								(1)											
(736) Kirklin								(1)	(3) pt.										
(457) Michigantown								(1)											
(1075) Mulberry (571)								(1)											
(830) Rossville								(1)	(1)										
CRAWFORD CO.:								(1)	(1½)	(1) joint cir. w. HarrisonCo				(1)	(1) Cir. jt. Harrison			(1W)	
Towns: (56) Alton								--											
(664) Englieh								(1)											
(330) Leavenworth								--											
(767) Marengo								(1)											

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
(829) Milltown								(1)											
DAVIESS CO.								(1)	X	(1)				(19) (2W)	(1)Cir.	X			
City: (11,358) Washington	(1)		(3)		(2)		(6)			(1)					(1)			(1W)	
Towns: (105) Alfordsville								--											
(149) Connelburg								--											
(873) Elnora								(1)											
(411) Montgomery								(1)											
(1433) (750) Odon								(1W)											
(538) Plainville								(1)											
DEARBORN CO.								(1)	X	(1) jt. dir. with Ohio Co.				(22)	(1)Cir. jt.	X			
Cities: (4,293) (2,243) Aurora	(1)						(7)			(1)					(1)				
(4,636) (2,382) Lawrenceburg	X									(1)					(1W)				
Towns: (840) Dillsboro								(1)	(1)										
(3783) (1974) Greendale	(1)						(5)												
(263) Hardinsburg								--											
(616) Moores Hill								(1)											
(435) St. Leon								(1)											
(395) West Harrison																			
DECATUR CO.								(1)	(4)	(1)				(14)	(1)Cir.	(1)		(2W)ct hs (2W) jail	
Cities: (8,620) (5,596) Greensburg	(1)		(2)	(3)			(6)			(1)					(1)				
Towns: (187) Melford								(1)											
(252) Millhouse								--											
(381) New Point								(1)											
(785) St. Paul																			
(1170) (618) Westport								(1)											
DeKALB CO.								(1)	(6)	(1)	(1)			(26) (2W)	(1)Cir.	(1)		(1W)	
Cities: (7,388) (3,867) Auburn	(1)	(1)	(1)				(7)			(1)					(1W)				
(2,394) Butler	(1)						(2)			(1)					(1)				
(4,715) (2,468) Garrett	(1)		(1)		(1)		(3)			(1)					(1)				
Towns: (269) Altona								--											
(721) Ashley								(1)	(1)										
(359) Corunna								(1)											
(537) Hamilton								(1)	(1)										
(564) St. Joseph								--											
(1876) (982) Waterloo							(2)	(1)											
DELAWARE CO.		(1) maj.	(3)		(5)		(13)	(1)		(1) (1) in-vestg. (1) ch. dep.	(4)	(3)		(98) (4W)	(1)Cir. (2)Sup.	(1)	(4)	(4W)	
Cities: (80,028) (36,312) Muncie	(1)	126 police positions-ranks & sex unknown								(1)					(h) (1)*	(1)*			
Towns: (2,293) (1,196) Albany								(1)	(2)										
(1,594) (786) Eaton								--	(6)										

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys.	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
(928) Gaston								(1)											
(890) Selma								—											
(1,673) (850) Yorktown								(1)											
DUBOIS CO.								(1)	(2)	(1) joint circuit with Martin Co.				(14) (1W)	(1) Circuit (jt Martin)	X		(2W)	
Cities: (4,794) (2,535) Huntingburg	X									(1)					(1)W				
(8,641) (4,488) Jasper	(1)						9 rank unknown			(1)					—				
Towns: (404) Dubois								X											
(1,432) (719) Ferdinand								(2)											
(662) Holland								—											
ELKHART								(1)	X	(1)				(104)	(1) Cir (2) Sup	X			
Cities: (43,152) (22,687) Elkhart	(1)						(93) pol. pos (1W) not ranked			(1)					(1)	(2)			
(17,171) (9,110) Goshen	(1)	(2) Cmdrs	(4)	(6)	(9)		(6)			(1)					(1)				
(4,159) (2,170) Nappanee	(1)				(1)		(5)			(1)					(1)				
Towns: (1,100) (590) Bristol								(1)	(1)										
(1,055) (560) Middlebury								(1)											
(618) Millersburg								(1)											
(1,160) (602) Wakarusa								(1)	(2)										
FAYETTE CO.								(1)	(3)	(1)	(1)			(13)	(1)Cir	(1)		(1W)	
City: (17,604) (9,140) Connersville	(1)		(6)		(6)		(26)			(1)					(1)				
Town: (452) Glenwood								(1)											
FLOYD CO.		(1) maj	(1)				(7) (1W)	(1)		(1)inves. (1)	(1)			(37)	(1)Cir	(1)			
City: (38,402) (20,463) New Albany	(1)	(60)unranked police (7W)				+ (14)HE (1W)	(1) A. Police			(1)					(1)				
Towns: (1,273) (651) Georgetown								(1)											
(611) Greenville								(1)											
FOUNTAIN CO.								(1)	X	(1)				(19)	(1)Cir	X			
Cities: (4,262) (2,221) Attica	X									(1)					(1)				
(2,641) (1,403) Covington	X									(1)					—				
Towns: (505) Hillsboro								(1)	(1)										
(530) Kingman								(1)											
(325) Mellott								(1)											
(286) Newtown								(1)											
(2,198) (965) Veedersburg								(1)	(1)										
(136) Wallace								—											
FRANKLIN CO.								(1)	(2) 1W	(1) joint circuit	(1) with Union	(1)		(8)	(1)Cir(jt)	(1W)		(1W)	
City: (3,799) (1,972) Batesville	(1)			(1)			2 + 1 spec			(1)*					—				
Towns: (2,864) (1,539) Brookville								(1)							(1)				
(248) Cedar Grove								—											
(128) Mt. Carmel								—											
(758) Oldenburg								(1)											

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (&wf Recrufts)	Sheriff or Marshall	Dep.	Prose-cuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
FULTON CO.								(1)	(3)	(1)				(13)	(1)Cir	(1)		(1)W	
City: (4,631) Rochester	(1)						(5)			(1)					(1)				
Towns: (1,019) (558) Akron								(1)	(2)										
(372) Fulton								(1)W											
(530) Kewanna								—											
GIBSON CO.								(1)	X	(1)				(18)	(1)Cir	X			
Cities: (3,289) (1,755) Oakland City	(1)						(3)			(1)					(1)				
(7,431) (4,005) Princeton	X									(1)					(1)				
Towns (2,535) (1,318) Fort Branch								(2)											
Tow (621) Francisco								(1)											
(1,171) (620) Haubstadt								(1)	(1)										
(416) Hazelton								(1)											
(121) Mackey								—											
(1,056) (567) Owensville								—											
(529) Petoka								(1)											
(313) Sommerville								(1)											
GRANT CO.								(1)	(10) (1W)	(1)legal advisor (2)W investg.	(2)	(1)		(62)	(1)Cir (2)Sup	(1)chief (6) (3W)		8 male (1W)matron	
Cities: (5,742) (2,974) Gas City	X									(1)					(1)				
(39,607) (20,306) Marion	(1)	(2)	(10)	(1)	(16)	(4)	(42)			(1)					(1)				
Towns: (3,427) (1,771) Fairmount								(1)	(3) +6 hourly										
(337) Fowlerton								(1)											
(2,466) (1,266) Jonesboro								(1)											
(728) Mathews								(1)											
(1,073) (552) Swayzee								(1)											
(1,076) (556) Sweetser								(1)											
(3,202) (1,626) Upland								(2)											
(1,057) (561) Van Buren								(1)											
GREENE CO.								(1)	(2)	(1)				(14) (1W)	(1)Cir	(1W)		(1)W	
Cities: (2,335) (1,231) Jasonville	(1)						(2)			(1)					—				
(5,450) (2,951) Linton	(1)						(7)			(1)					—				
Towns: (2,565) (1,408) Bloomfield								(1)	(3)										
(702) Lyons								—											
(295) Newberry								—											
(301) Switz City								—											
(1,691) (903) Worthington								(1)*											
HAMILTON CO.								(1)	(11)	(1) +2 leg. interns	(1)	ch. dep. (1)		(61) (5W)	(1)Cir (1)Sup 1W	(1)		(2)jailers 2W (1PT)	
City: (7,548) (3,990) Noblesville	(1)		(1)	(2)	(1)		(7)			(1)					(1)				
Towns: (1,338) (684) Arcadia								(1)											
(620) Atlanta								(1)											

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prose-cuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
(10,653) (3,388) Carmel				(1)	(1)	(1)	(7)	(1)							(1)				
(1,378) (710) Cicero				(1)				--	(3) pt.										
(628) Fishers								(3)											
(1,837) (960) Westfield								(1)	(1)										
HANCOCK CO.								(1)	(5)	(1)				(28) (2W)	(1) Cir (1) Sup (1) County Court	(1)	(1) 1W	(5W)	
Cities:																			
(9,986) Greenfield	X									(1)					—				
Towns:																			
(1,478) Cumberland								(1)											
(2,460) (1,295) Fortville								(1)											
(863) New Palestine								(1)	—										
(958) Shirley								(2)											
(263) Spring Lake								(1)											
(480) Wilkinson								(1)											
HARRISON CO.							(1)	(4) (1W)		(1) joint circuit with Crawford Co.				(12)	(1) Cir (jt) Crawf.	1	(1W)	(1W)	
Towns: (2,719) (1,440) Corydon								(1)											
(188) Crandall								--											
(195) Elizabeth								—											
(641) Laconia								—											
(586) Lanesville								(1)											
(119) Mauckport								--											
(829) Milltown see also under Crawford Co.								(1)											
(32) New Amsterdam								—											
(133) New Middletown								—											
(483) Palmyra								(1)											
HENDRICKS CO.								(1)	(7)	(1)				(45) (1W)	(1) Cir (1) Sup	(1) Cir. Ct. (1) Super. Ct.		(2) (1W) matron	(1W)
Towns: (422) Amo								(1)											
(5,186) (2,641) Brownsburg								--											
(736) Clayton								(1)											
(453) Coatesville								(1)											
(3,771) (2,021) Danville					(1)	(1)	(4)	(1)											
(397) Lizton								(1)											
(601) North Salem								(1)											
(867) Pittsboro								--											
(8,211) (4,221) Plainfield								(1)											
(352) Stilesville								(1)											
HENRY CO.								(1)	EEA (4) (1W) (5)	(1)	(2) EEA			(30) b (1W)	(1) Cir (1) Sup	(1) Cir. Ct. + EEA (1W)		(1W)	
City (21,215) (11,098) New Castle	(1)	(1)	(5)	(4)	(5)		(26) (2W)			(1)					(1)				
Towns: (220) Blountsville								(1)											
(207) Cadiz								(1)	(1)										
(200) Dunreith								—											

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Police: Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
HENRY CO. con't.																			
(225) Greensboro								--											
(518) Kennard								—											
(2,456) (1,322) Knightstown								(1)	(3)						(1)				
(530) Lewisville								(1)											
(2,033) (1,071) Middletown	(1)	(1)						(1)	(1)										
(495) Mooreland								(1)											
(395) Mt. Summit								—											
(958) Shirley see Hancock Co.								(2)											
(957) Spiceland								(1)											
(236) Springport								--											
(329) Straughn								(1)											
(387) Sulphur Springs								--											
HOWARD CO.		1 major	(1)		(6)			(1)	(17) (1W)	(1) (1) ch. dep. (1) investg.	(2)	(1)	(2)	(70) (2W)	(1)Cir (1)Sup	(1W) Dir. (4) (2W)-w. pd. less than M. P.O.		(3W)	
City: (44,042) (23,019) Kokomo	(1)	(2)	(9)	(10)	(28)		(57) (2W)			(1)					(1)	(1)			
Towns: (870) (981) Greentown								(1)											
(844) Russiaville								(1)							(1)				
HUNTINGTON CO.								(1)	(4)	(1) (1)investg.	(1)			(26) (2W)	(1)Cir	(1)		(1W)	
City: (16,217) (8,570) Huntington	X									(1)					(1)				
Towns: (1,207) (609) Andrews								—											
(963) Markle								(1)	(1)										
(164) Mt. Etna								(1)											
(858) Roanoke								(1)											
(1,229) (667) Warren								(1)											
JACKSON CO.				(1)	(1)		(2)	(1)		(1) (1)investg.				(18) (1W)	(1)Cir	(1)		(1W)	(1W)
City: (13,352) (7,030) Seymour	(1)	(no further info)								(1)					(1)				
Towns: (2,376) (1,266) Brownstown								(1)											
(1,663) (843) Crothersville								(1)											
(788) Medora								—											
JASPER CO.			(1)				(3) 3 p.t.	(1)		(1)				(14)	(1)Cir	.X		(3)jailers (3)p.t. jailers (1W)matron	
City: (4,688) (2,515) Rensslaer	X									(1)					(1)				
Towns: (1,697) (838) DeMotte								(1)							(1)				
(1,127) (600) Remington								(1)	(1) part										
(713) Wheatfield								(1)											
JAY CO.								(1)	X	(1)				(9)	(1)Cir	X			
Cities: (3,465) (1,828) Dunkirk	(1)						(5)			(1)					(1)				
(7,115) (3,794) Portland	(1)				(2)		(4) + 1 chf. invstg.			(1)					(1)				
Towns: (320) Bryant								(1)											
(798) Pennville								(1)											
(1,667) (875) Redkey								—											

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (Incl Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
JAY CO. con't																			
(162) Salamonia								---											
JEFFERSON CO.								(1)	X	(1) joint circuit with Switzerland Co.				(20) (1W)	(1) Cir	(jt) X			
City: (13,081) (7,014) Madison	(1)						(23) not ranked			(1)					(1)				
Towns: (104) Brooksburg								---											
(357) Du Pont								---											
(3,018) (1,559) Hanover								(1)											
JENNINGS CO.								(1)	(2)	(1)	(1)			(7)	(1) Cir	(1)		(1W)	
City: (4,582) (2,452) North Vernon	X									---					---			(1W)	(1W)
Town: (440) Vernon								(1)*											
JOHNSON CO.				(1)	(3)		(7)	(1)		(1)	(4)			(48) (1W)	(1) Cir (1) Sup	(1)	(1)		
Cities: (11,477) (6,086) Franklin	X									(1)					(1)				
(11,408) (5,945) Greenwood	(1)			(3)	(7)	(2)	(7)			(1)					(1)*				
Towns: (873) Bargersville								(1)											
(2,521) (4,906) Edinburg see under Bartholomew Co.																			
(4,200) (2,098) New Whiteland								(1)	(3)										
(597) Prince's Lake								(1)	(1)										
(457) Trafalgar								post vacant											
(1,492) (760) Whiteland								(1)											
KNOX CO.								(1)	(11)	(1)				(29)	(1) Cir (1) Sup	(1)	(1)	(1W)	
Cities: (3,717) (2,021) Bicknell	X									(1)					(1)				
(19,867) (10,187) Vincennes	X									(1)					(1)				
Towns: (627) Bruceville								---											
(268) Decker								(1)											
(482) Edwardsport								--											
(603) Monroe City								--											
(726) Oaktown								(1)	(1)										
(528) Sandborn								(1)											
(562) Wheatland								(1)											
KOSCUISKO CO.	---							(1)	X	(1)				(31) (1W)	(1) Cir (1) Sup	X			
Cities: (4,159) Nappanee See under Elkhart Co.																			
(7,506) (3,999) Warsaw	supt. (1)		(1)	(1)	(3)		(10)			(1)					(1)				
Towns: (210) Brukett								(1)											
(468) Claypool								(1)											
(516) Etna Green								(1)											
(561) Leesburg								(1)											
(1,264) (672) Melford								(1)											
(830) Mentone								(1)	(1)										
(456) North Webster								(1)											
(1,175) (621) Pierceton								(1)	(2)										

	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
County, City or Town	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (2nd Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
KOSCIUSKO CO. cont																			
(179) Sidney								(1)											
(588) Silver Lake								(1)											
(1,546) (788) Syracuse								(1)	(3)										
(2,811) (1,466) Winona Lake								(1)											
LAGRANGE CO.								(1)	(3)	(1)				(8)	(1)Cir	(1)		(1W	
Towns: (448) Shipshawana								(1)											
(677) Topeka								(1)											
(915) Wolcottville								(1)	(1)ngt.										
LAKE CO.		(1)maj (1)chief asst	(8)	(6)	(13)	Detective (14)	(104) 2W	(1)		(1) 4inve (1)ch.dep (1)trial	(40) 1W sup.	(1) (1)ch.dep.	(4)	(46) (12W)	(1)Cir (10)Sup	(1) DR. (1)asst.DR	(8)p.c. 4 p.t. 3feds	X (1W)	
Cities: (10,931) (5,639) Crown Point	(1)				(6)		(9)			(1)					(1)				
(46,982) (23,814) East Chicago	X									(1)					(1)				
East Gary	(1)				(3)		(10)			(1)					(1)				
(175,415) (90,737) Gary	no position or rank info.									(1)					(1)				
(107,790) (54,819) Hammond	X									(1)					(1)				
(21,485) (10,858) Hobart	X									(1)					(1)				
(7,247) Whiting	X									(1)					(1)				
Towns: (7,589) (3,457) Cedar Lake	(1)		(1)		(1)		(6) (1W)												
(4,906) (2,521) Dyer	(1)				(1)		(5)												
(18,168) (9,097) Griffith	(1)			(2)	1 detec. (8)		(7)												
(24,947) (12,677) Highland	(1)		(1)	(1)	(4)+ (3) 2)detec.		(18)												
(3,839) (1,980) Lowell	(1)				(1)		(5) + 3 spec.												
(24,075) Merrillville	(1)						(15) prob p.												
(16,514) (8,441) Munster	(1)			(1)	(4) +2det.		(16)												
(2,231) (1,123) New Chicago								(1)											
(1,757) (872) St. John	(1)				(1)		(2) +(2)spec.												
(3,663) (1,846) Schererville						(4)	(2) +(1)P.T.	(1)											
(426) Scheider								(1)											
LaPORTE CO.			(1)		(5)		(17)	(1)		(1)	(7)			(53) (1W)	(1)Cir. (2)Sup.	(1) (3) 2W	(3) 1W	(1W)	
Cities: (22,140) (11,645) LaPorte	(1)						(39) unranked			(1)					(1)				
(39,369) (19,546) Michigan City	(1)		(7)		(9)	(12)	(64) (2W)			(1)					(1)	(1)			
Towns: (314) Kingsbury								(1)											
(1200) (637) Kingsford Heights								(1)											
(696) LaCross								--											
(2740) (1416) Long Beach								(1)	(6)										
(449) Michiana Shores								(1)	(1)										
(374) Pottawattomie Park								(1)											
(2697) (1334) Trail Creek								(1)	(1)										
(773) Wanatah								(1)											
(2614) (1150) Westville								(1)	(8)										

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
LAWRENCE CO.								(1)	(9)	(1)				(21)	(1) Cir. (1) Sup.	(1) cir.		(2) turnkey +(1) extra (1W) (1W) matron	
Cities: (15,700) (7,014) Bedford	X									(1)					(1)				
(4092) (2176) Mitchell	(1)						(5)			(1)					(1)				
Towns: (1155) (620) Oolitic								(1)											
MADISON CO.		(1) admn. asst.	(3)	(2)	(2)		(8)	(1)		(1) (1) invst.	(1) ISV dep. 5 (1W)			(100) (7W)	(1) Cir. (2) Sup.	(2) #1 (4) 1W	#2 (3) 1W	(3W	
Cities: (5600) (2678) Alexandria	(1)	(1)			(2)		(6) + 4 extra help			(1)					(1)				
(70,511) (36,940) Anderson	(1)*	(1)*	(7)*	+2 inspectrs. (7)*	(33)*		(84)*			(1)	(1)*				(1)*	(1)*			
(11,196) (5,900) Elwood	(1)	(1)	(1)	(1)	(1)		(7)			(1)					(1)				
Towns: (3001) (1526) Chesterfield								(1)	(3)										
(118) Country Club Heights																			
(2326) (1167) Edgewood								(1)											
(1796) (912) Frankton								(1)											
(6) Gimco City								(1)											
(880) Ingalls								(1)											
(1725) (874) Lapel								(1)	(1)										
(457) Markleville								--											
(519) Orestes								(1)	(1)										
(2243) (1180) Pendleton								(1) chief	(2)										
(27) River Forest								(1)											
(1104) (573) Summitville								(1)											
MARION CO.		1 LtCo 1 (4) mx.	(5)	(19)	(74) (2W)	(44)	(178) (15W)	(1)		(1) (3) chiefs*	(66) (2W)	(10) (1W)		(1774) (68 W)	(1) Cir. (15) Mx. Sup. (4) Crim	(12) (1) chief (7W)	(1) (1W)	vä spec. case worke	
Cities: (14700) (7017) Beech Grove	X									(1)					--				
(743,155) (387,270) Indianapolis	X									(1)					--				
(16,646) (8,488) Lawrence	(1)		(1)	(2)	(5) (1W)		(17)			(1)					--				
(2,505) (1,287) Southport	(1)						(4)			(1)					--				
Towns: (183) Castleton								(1)											
(1423) Clermont								(1)	(1)										
(100) Crows Nest								(1)											
(1478) Cumberland	See Under Hancock Co.																		
(33) Highwoods								--											
(964) Homecroft								(1)											
(1850) Meridian Hills								(1)	(3) p.t.										
(50) N. Crows Nest								--											
(656) Ravenswood								--											
(1192) Rocky Ripple								--											
(15056) (7848) Speedway	(1)		(1)	(5)	(4)		(13) (1W)												
(22) Spring Hills								--											
(1987) Warren Park								--											
(485) Williams Creek								(1)											

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Police: Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys.	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
(124) Wymsdale								--											
MARSHALL CO.			(1)		(2)		(2)	(1)		(1) (1) invstg.	(1)			(26) (1W)	(1)Cir. (1)Sup.	(1) (1W)		(1W)	
City: (7661) (4018) Plymouth	(1)				(2)		(9)			(1)					(1)				
Towns: (1393) (718) Argos								(1)	(1)										
(1606) (877) Bourbon	(1)						(1)												
(3487) (1865) Bremen	(1)						(6)												
(1783) (929) Culver								(1)	(2)										
(604) Lapas								(1)											
MARTIN CO.								(1)	X	(1) joint circuit with Dubois Co.				(3)	(1)Cir. jt.	X			
City: (2953) (1536) Loogootee	X									(1)					(1)				
Towns: (339) Crane								(1)											
(1039) (550) Shoals								(1)											
MIAMI CO.			(1)		(1)		(1)	(1)		(1) invstg. (1)	(1)			(13)	(1)Cir.	(1)		(2) jailers (1W) matron	
City: (14,139) (7512) Peru	(1)	(1)	(1)	(3)	(6)		(14)			(1)					(1)				
Towns: (473) Amboy								(1)											
(956) Bunker Hill								(1)											
(1163) (583) Converse								(1)											
(566) Denver								--											
(273) Macy								--											
(107) North Grove								--											
MONROE CO.		(1)	(2)		(1) det.		(11)	(1)		(1) (7) invstg. 1W + (1)PT	(2) (1W)	(1)	(1)	(100) (7W)	(1)Cir. (2)Sup.	(1) (1) asst. 1W		(2) jailers (1W)	
City: (42,890) (22,121) Bloomington	59	no rank (3W)								(1)					(1)				
Town: (1617) (850) Ellettsville								(1)											
(291) Stinesville								(1)											
MONTGOMERY CO.		(1)					(3)	(1)		(1)				(24)	(1)Cir.	(1) initials	(2W) fed $	(3)turnkey (2W)matrons	(2) PT turnkeys
City: (13,842) (7072) Crawfordsville	(1)*		(1)*	(5)*	(6)*		(15)*			(1)					(1)				
Towns: (145) Alamo								X											
(802) Darlington								(1)											
(1099) (601) Ladoga								(1)											
(713) Linden								(1)											
(640) New Market								(1)											
(381) New Richmond								--											
(318) New Ross								--											
(557) Waveland								(1)											
(993) Waynetown								(1)											
(437) Wingate								(1)											
MORGAN CO.		(1)					(5)	(1)		(1) (1) invstg.	(1) + (1W) intern	(1)		(23)	(1)Cir. (1)Sup.	(1)Cir.Ct. (1)Sup.Ct.		(3) & rad op.(1W) matron	(2W) matrons
City: (9723) (5172) Martinsville	(1)	(2)					(8)			(1)					(1)				
Towns: (121) Bethany								--											

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Police: Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
(911) Brooklyn								(1)											
(5000) (2961) Mooresville								(1)	(8)						(1W)				
(1134) (592) Morgantown								(1)	(1)										
NEWTON CO.			(1)		(1)		(3)	(1)		(1)				(11)	(1)Cir.	X		(1W)	
Towns: (919) Brook								(1)											
(1864) (607) Goodland								(1)											
(1285) (671) Morocco								(1)	(1)										
(194) Mt. Ayr								(1)											
NOBLE CO.								(1)	X	(1)				(17)	(1)Cir.	X			
City: (6838) (3577) Kendallville	(1)		(1)		(2)			(4) + 8 PT		(1)					(1W)				
(3034) (1603) Ligonier	(1)						(3) + 1 PT			(1)					--				
Towns: (1498) (770) Albion								(1)	(1) (1) PT										
(881) Avilla								(1)							(1)				
(475) Cromwell								(1)							(1)				
(1354) (680) Rome City								(1)											
(915) Wolcottville	See under LaGrange Co.																		
OHIO CO.								(1)	(1)	(1) joint Cir. with Dearborn Co.				(3)	(1) Cir (jt)	X		(1W)	
City: (2305) (1240) Rising Sun	(1)						(3)			(1)					--				
ORANGE CO.								(1)	(3)	(1)				(7) (1W)	(1)Cir.	(1W) Cir. Ct.		(1W)	
Towns: (2059) (1039) French Lick								--											
(1934) (957) Orleans								(1)	(1) (1) PT										
(3281) (1740) Paoli								(1)	(3)										
(930) West Baden Springs								(1)											
OWEN CO.								(1)	X	(1)				(12)	(1)Cir.	X			
Towns: (692) Gosport								(1)											
(2423) (1309) Spencer								(1)											
PARKE CO.								(1)	(3)	(1)	(1)			(8)	(1)Cir.	(1W)		(1W)	
Towns: (391) Bloomingdale								(1)											
(35) Judson								--											
(365) Marshall								--											
(1192) (651) Montezuma								(1)											
(2820) (1542) Rockville		(1)						(1)	(3)										
(817) Rosedale								(1)											
(263) Spring Lake	See under Hancock Co.																		
PERRY CO.								(1)	(2)	(1)				(10)	(1)Cir.	(1)	(1W)	(1W)	
Cities (1192) (2280) Cannelton	(1)						(2) + (1) PT			(1)					(1)				
(7933) (9119) Tell City	(1)	(1)					(6)			(1)					(1)				
(575) Troy								--											
PIKE CO.								(1)	(1)	(1)	(1) at pd.			(8)	(1)Cir.	(1)		(1W)	

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (a-nd. Recruits)	Sheriff or Marshall	Dep.	Prose-cuting Attny.	Dep. or Asst.	Public Defendar	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
PIKE CO. (cont.)																			
City: (2697) (1448) Petersburg	(1)							(4)		(1)					(1)				
Towns: (285) Spurgeon								(1)											
(1030) (561) Winslow								--											
PORTER CO.								(1)	(28) (3W)	(1) (1) invstg.	(8) (2W)	(1)	(1)	(93) (3W)	(1)Cir. (2)Sup.	(4) (1W)		(3)m jailers (1)W matron	
Cities: (19,127) (9511) Portage	(1)		(1)	(2)	(6)	(7)	(13)			(1)					(1)				
(20,020) (10,233) Valparaiso	(1)	(1)	(3)	(1)	(2)	(3)	(20) + 4 hwy			(1)					(1)				
Towns: (946) Beverly Shores								(1)	(2)										
(1284) (618) Burns Harbor								--											
(6117) (3184) Chesterton					(4)	(1)	(4)	(1)							(1)				
(301) Dune Acres								--											
(1624) (819) Hebron								(1)	(1)										
(1388) (721) Kouts								(1)											
(1361) (662) Ogden Dunes								(1)	18PT (2W) (3) ZA										
(3058) (1499) Porter								(1)	(3) (8)PT										
POSEY CO.		(1)						(1)	(2)	(1)	(1)			(10)	(1)Cir.	(1W) cir. ct.		(1W)	
City: (6770) (3554) Mt. Vernon	(1)	(1)					(7)			(1)					--				
Towns: (793) Cynthiana								(1)											
(178) Griffin								(1)											
(971) New Harmony								(1)											
(1035) (539) Poseyville								(1)											
PULASKI CO.					(1)		(1)	(1)		(1)				(5)	(1)Cir.	(1) PT		(1W)	
Towns: (1015) (538) Francesville								--											
(732) Medaryville								--											
(268) Monterey								(1)											
(2341) (1262) Winamac								(1)											
PUTNAM CO.								(1)	X	(1)				(14)	(1)Cir.	X			
City: (8852) (4600) Greencastle	X									(1)					--				
Towns: (703) Bainbridge								--											
(870) Cloverdale								(1)	(1)										
(1004) Roachdale								(1)											
(390) Russellville								(1)											
RANDOLPH CO.								(1)	X	(1) (1) invstg.	(2) (1W)			(18) (1W)	(1)Cir.	(1)	(1W)		
Cities: (3995) (2052) Union City	(1)						(4) +(2) PT (1W)			(1)					(1)				
(5493) (2896) Winchester	(1)						(3)spec. pol.(5)			(1)					(1)				
Towns: (1262) (671) Farmland								(1)	(1)										
(212) Losantville								(1)											
(1360) (734) Lynn								(1)	(1) night										
(275) Modoc								(1)											
(1179) (599) Parker								(1)											

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
(924)																			
Ridgeville								(2)											
(406)																			
Saratoga								(1)											
RIPLEY CO.								(1)	(2)	(1)	(1)			(14)	(1)Cir.	(1)			
City: (3799)																			
(1972)																			
Batesville	See under Franklin Co.																		
Towns: (1260)																			
(676)																			
Milan								(1)											
(282)																			
Napoleon								(1)											
(1346)																			
(721)																			
Osgood								--											
(707)																			
Sunman								(1)							(1)				
(1020)																			
(540)																			
Versailles								(1)											
RUSH CO.								(1)	X	(1)				(16)	(1)Cir.	X			
City: (6686)																			
(3561)																			
Rushville	X									(1)					(1)				
Towns: (946)																			
Carthage								(1)											
(452)																			
Glenwood	See under Fayette Co.																		
SAINT JOSEPH CO.		(2)	(7)		(14)		(68) (2W)	(1)		(1) (1) ch. dep.	(9)	(3)		(289) (4W)	(1)Cir. (5)Sup.	(1)	(3)	(4W)	
Cities: (35,517)																			
(18,659)																			
Mishawaka	X									(1)					--				
(125,580)																			
(65,822)																			
South Bend	X									(1)					--				
Towns: (86)																			
Indian Village								--											
(712)																			
Lakeville								(1)											
(1434)																			
(761)																			
New Carlisle								(1)	(2)										
(1259)																			
(663)																			
North Liberty								(1)	(3)										
(1572)																			
(792)									(1)										
Osceola	(1)	(1)							(6)PT										
(895)																			
Roseland								(1)											
(2006)																			
(1023)																			
Walkerton								(1)	(5)										
SCOTT CO.								(1)	(2) (1)PT	(1)				(9)	(1)Cir.	(1W)		(1W)	
City: (4,791)																			
Scottsburg	(1)						(7)			(1)					--				
Town: (4902)																			
Austin (2468)								(1)											
SHELBY CO.								(1)	X	(1)				(35) (1W)	(1)Cir. (1)Sup.	X			
City: (15,094)																			
(7976)																			
Shelbyville	(23) total no ranks given									(1)					(1W)				
Towns: (838)																			
Morristown								--											
(785)																			
St. Paul	See under Decatur Co.																		
SPENCER CO.								(1)	X	(1)				(10) (2W)	(1)Cir.	X			
City: (2565)																			
(1332)																			
Rockport	X									(1)					(1)				
Towns: (550)																			
Chrisney								(1)											
(1113)																			
(569)																			
Dale								(1)											
(281)																			
Gentryville								(1)											
(695)																			
Grandview								--											
(63)																			
Santa Claus								(1)											
STARKE CO.								(1)	(4)	(1)				(12)	(1)Cir.	(1W)		(1W)	
City: (3519)																			
(1852)																			
Knox	(1)				(1)		(4)			(1)					(1)				

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Police: Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
Towns: (761)																			
Hamlet (1738)								(1)	(1)										
North Judson (902)																			
STEUBEN CO.								(1)	(11) (6)PT	(1)				(17)	(1)Cir.	(1)		(1W)	
City: (5117)																			
Angola (2169)	(1)						(6)			(1)					(1)				
Towns: (271)																			
Clear Lake (1043)								(1)											
Fremont (551)								--											
Hamilton (537)	See under DeKalb Co.																		
Hudson (464)								--											
Orland (457)								(1)											
SULLIVAN CO.								(1)	(3)	(1)				(12) (1W)	(1)Cir.	X			
City: (4683)																			
Sullivan (2577)	(1)	(1)			(1)		(5)			(1)					--				
Towns: (714)																			
Carlisle								--											
(1150)																			
Dugger (605)								--											
(962)																			
Farmersburg								(1)											
(907)																			
Hymera								(1)											
(305)																			
Merom								--											
(1281)																			
(658)																			
Shelburn								(1)											
(1463)																			
(998)									(2)+ (2)PT										
Vevay								(1)											
SWITZERLAND CO.								(1)	(2)	(1) joint circuit with Jefferson Co.		(1)		(3)	(1)Cir. (jt.)	(1)		(1W)	
Town: (216)																			
Patriot								(1)											
TIPPECANOE CO.			(1)	(1)	(4)			(1)	(19) (1W)	(1) + (1) invst.	(4) (1W)	(1)		(111) (3W)	(1)Cir. (2)Sup.	(2) (1W)		(1) jailer (3) W	
Cities: (44,955)					(9) +														
(23,557)				(8)	6 det														
Lafayette	(1)	(1)		(1W)			(47)			(1)					(1)				
(19,157)																			
(8,743)																			
West Lafayette	(1)		(3)		(6)		(16)			(1)					(1)				
Towns: (818)																			
Battle Ground								(1)											
(741)																			
Clarks Hill								(1)											
(889)																			
Dayton								--											
TIPTON CO.								(1)	X	(1)				(10)	(1)Cir.	X			
City: (5176)																			
(2682)																			
Tipton	(1)	(1)			(3)		(3)			(1)					(1)				
Towns: (469)																			
Kempton								(1)											
(672)																			
Sharpsville								(1)											
(946)																			
Windfall								(1)											
UNION CO.								(1)	(1W)	(1) joint circuit with Franklin Co.		(1)		(8)	(1)Cir. (jt.)	(1)		(1) jailer (1)W PT	
Towns: (975)																			
(1831)																			
Liberty								--											
(709)																			
West College Corner								(1)											
VANDERBURGH CO.		(1)		(2)	(9)	(6) det.	(49) (5W)	(1)		(1) ChDep. (1) ChAdm	(7)+ (3) invst. 1W	(2)+ 2 invst.		(185) (4W)	(1)Cir. (4)Sup.	(1) (1) ch. dep.-1W	(1)	(1) 8-2W	
City: (138,746)					37-1W														
(73,924)		(1) + (3) In-			35det		(140)									(2)			
Evansville	(1)	sp.	(11)	(15)	IW		(10W)			(1)		(1) PT			(1)	(1) PT			
VERMILLION CO.								(1)	(3)	(1)	(1)	(1)		(8)	(1)Cir.	(1)		(1W)	
City: (5340)																			
(2876)																			
Clinton	X									(1)					(1)				
Towns: (1090)																			
(579)																			
Cayuga								--											

County, City or Town	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prosecuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attys.	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
(720) Dana								(1)											
(1067) (540) Fairview Park								(1)											
(708) Newport								(1)											
(510) Perrysville								(1)											
(462) Universal								--											
VIGO CO.		(1)	(1)	(3)	(3)	(1)		(1)	(17)	(1)+(1)ch dep + 1 invest.	(6) (1W)	(1)+ (1) investigator	(1)	(83) (3W)	(1)Cir. (2)Sup.	(2)		(2W) matrons (2M) turnkeys	
City: (70,286) (35,456) Terre Haute	(1)		(3)	(9)	(18)	(7)	(69)			(1)					(1)				
Towns: (257) Riley								(1)											
(1195) (624) Seelyville								(1)											
(2704) (1409) West Terre Haute								(1)											
WABASH CO.								(1)	X	(1)				(17) (1W)	(1)Cir.	X			
City: (13,379) (7048) Wabash	(1)	(1)	(3)		(5)		(16) 12 recruits			(1)		(1)			(1)	(1)			
Towns: (793) LaFountaine								(1)	(1) PT										
(552) Largo								(1)											
(5791) (3152) North Manchester								(1) + 1 asst.	(7)						(1)				
(509) Roann								(1)											
WARREN CO.								(1)	(2)	(1)				(8) (1W)	(1)Cir.	X		(1W)	
Towns: (291) Pine Village								--											
(176) State Line								--											
(899) West Lebanon								(1)											
(1661) (851) Williamsport								(1)											
WARRICK								(1)	X	(1)				(13)	(1)Cir.	X			
City: (5736) (3076) Boonville	(1)			(1)	(2)		(4) + 2 PT			(1)*					(1)				
Towns: (2032) (1061) Chandler								(1)	(2)+ (4)PT										
(834) Elberfeld								(1)											
(556) Lynnville								(1)											
(2302) (1173) Newburgh		(1) asst.			(2)		(7) (hrly)	(1)	(2)										
Tennyson (335)								--											
Washington								(1)	X	(1)				(10)	(1) Cir.	X			
City: (5041) (2711) Salem	(1)		(1)	(1)	(2)		(3)			(1)					(1)				
Towns: (678) Campbellsburg								(1)											
(207) Fredricksburg								--											
(191) Little York								--											
Livonia (120)								(1)											
Pekin (912)								(1)											
Saltillo (134)								--											
WAYNE CO.		(1) maj.		(1) det.	(1)		(7)	(1)		(1) + invst.	(2)	(1)Cir. (1)Sup. (same)		(58) (2W)	(1)Cir (2)Sup	(1)-W	(3)	(4) turnkey +1 PT (3W) matrons +1 PT	
City: (43,999) (23,247) Richmond	(1)	(1)	(4)	(6)	(12)		(35) (2W)			(1W)					(1)				
Towns: Boston (210)								--											

	LAW ENFORCEMENT									LAWYERS/COURTS						CORRECTIONS			
County, City or Town	Police: Chief	Dep. Asst.	Capt.	Lt.	Sgt.	Corp.	Patrol (and Recruits)	Sheriff or Marshall	Dep.	Prose-cuting Attny.	Dep. or Asst.	Public Defender	Dep.	Private Attnys	Court (Judges)	Probation Officers	Dep.	Jailers and Matrons	Dep. or Asst.
(2481) (1320) Cambridge City								(1)	(2) +(2) PT										
(2380) (1265) Centerville								(1)	(1) +(3) spec.	dep.									
(1021) Dublin (543)								(1)											
East Germantown/ Pershing (447)								(1)											
Economy (285)								--											
(852) Fountain City								(1)											
(444) Greensfork								(1)											
(2059) (1127) Hagerstown								(1)	(3)										
Milton (694)								(1)											
(157) Mt. Auburn								--											
(437) Spring Grove								--											
(111) Whitewater								--											
WELLS CO.								(1)	(3)	(1)				(17)	(1)Cir.	(1)		(1W)	
City: (8297) (4374) Bluffton	X									(1)					(1)				
Towns: Markle (963)																			
(1538) Ossian (799)								(1)	(1)										
Poneto (286)								--											
(349) Uniondale								(1)											
(140) Vera Cruz								--											
WHITE CO.								(1)	(4)	(1) 1 invst.	(1)			(17)	(1)Cir.	(1)		(1W)	(1W)
City: (4869) Monticello	(1)				(2)		(4)			(1)					(1)				
Towns: (1232) (644) Brookston								(1)	(1)										
(510) Burnettsville								(1)											
(544) Chalmers								(1)											
(1548) Monon (836)								(1)	(1)										
Reynolds (641)								(1)*											
Wolcott (894)								(1)											
WHITLEY CO.								(1)	X	(1)				(16) (2W)	(1) Cir.	(1)			
City: (4911) Columbia City	(1)				(3)	(2)	(5)			(1)					(1)				
Towns: (1528) (773) Churubusco								(4)	(4) PT										
Larwill (324)								--											
(1362) (723) South Whitley								(2)											
TOTALS	95	69	164 3 W	183 1 W	608 5 W	115	2422 66 W	438 4 W	453½ 14 W	217 2W 37 invst (2 W)	203 10 W 4 inv. 2 W	36 1W 4 invst	17	4907 172 W	278 8 W	154 40 W	21 7 W	39 jailers 86 matrons 3W	

Notes to Appendix

(a) There are 92 counties, 114 cities, and 450 towns in Indiana.

(b) Most of the information in the chart is taken from the 100R report filed by each county, city, and town available from the State Board of Accounts, 912 State Office Building, Indianapolis, Indiana. Since these reports

contain at the best, first and last names of employees and since Equal Employment Opportunity forms which compile statistics according to sex are not public, the numbers of women indicated are the ones positively identified. There may be others but the percentage of women would not change substantially. The figures indicate total employees within each category and the indication of women (W) shows how many of the total are women.

Other information is from the Roster of state and local officials of the State of Indiana from the State Board of Accounts. Still other information, particularly concerning towns, is from the files of the Indiana Association of Cities and Towns. This latter information is provided on a voluntary basis by cities and towns.

(c) Number of attorneys is derived from the Indiana Supreme Court Disciplinary List, October 1972-73. Since there is no record of the type of practice in which attorneys are engaged, these figures represent total numbers of attorneys registered according to county and indicate the total number of women in each total. Again, this designation according to sex was derived from given names.

(d) By statute, county sheriffs manage county jails and thus function in a "corrections" capacity.

(e) X indicates no information was available.

(f) The first number is total population; the second is total female population for the political unit. Figures from the 1970 census.

(g) No attempt was made to distinguish full-time and part-time employees unless the 100R report stated specifically part-time.

(h) * indicates sex was indeterminable, usually because the report contained only the initials of the employees.

(j) E.E.A. employees are employed through emergency employment funds available from the federal government and are indicated as such when so reported on 100R. Use of such funds to increase the number of women employees is notable since the federal money is not permanently available.

Questioning the Juvenile Commitment: Some Notes on Method and Consequence

EDWARD CHASE*

Recent years have witnessed a continuing struggle by defense lawyers to rephrase the issues of the juvenile justice process in constitutional rather than child welfare terms.[1] This struggle to limit the state's power to intervene in a child's life and to substitute the formalities of rule and procedure for the informal discretion of juvenile court officials has produced only limited success. Some adjudicative practices have been modified to conform with constitutional guarantees.[2] Beyond adjudicative procedures, however, change has been glacial. Substantive issues have been litigated successfully in only a handful of cases, and pretrial practices have been only randomly constitutionalized. Change at the dispositional level has been even less apparent.[3]

The reasons for resistance to constitutional domestication in these areas are not obscure. Juvenile courts have consistently professed individualized, rehabilitative treatment for children,[4] and any legal assault on the pretrial and dispositional levels, the phases directly concerned with implementation of the asserted uniqueness,[5] threatens to question the integrity of the entire

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[1]*See* S. FOX, THE LAW OF JUVENILE COURTS IN A NUTSHELL viii (1971). *Compare In re* Gault, 387 U.S. 1 (1967, *with* Commonwealth v. Fisher, 213 Pa. 48, 52-57, 62 A. 198, 200-01 (1905).

[2]*See In re* Winship, 397 U.S. 358 (1970) (delinquency based on criminal law violation must be proved beyond a reasonable doubt rather than by a preponderance of evidence); *In re* Gault, 387 U.S. 1 (1967) (juvenile charged with criminal law violation has rights to counsel, notice of charges, confrontation, and cross-examination, and privilege against self-incrimination). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury trial not required in juvenile cases).

[3]*See* Chused, *The Juvenile Court Process: A Study of Three New Jersey Counties*, 26 RUTGERS L. REV. 488, 489 (1973) (citing numerous cases).

[4]*See* O. KETCHAM & M. PAULSEN, CASES AND MATERIALS RELATING TO JUVENILE COURTS 1-16 (1967).

[5]*See In re* Gault, 387 U.S. 1, 22, 31 n.48 (1967). Adult criminal law has no counterpart to the pretrial intake phase of the juvenile justice process, a phase at which individualized determinations of "whether the interests of the public or of the child require that further action be taken" are made. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD JUVENILE COURT ACT § 12 (6th ed. 1959). At the dispositional level, statutes give a juvenile judge a variety of options. He may postpone adjudication of guilt contingent upon a child's maintaining good behavior for a specified time, release the child with or without warning, place the child on probation, or commit him to an institution. *E.g.*, N.J. STAT. ANN. 2A:4-61 (Supp. 1974-75).

process. Moreover, a court, especially one inclined to restraint rather than activism,[6] will always consider substantive reform more unpalatable than procedural reform. It is one thing, for example, for a court to require notice and counsel before allowing the state to deprive an "incorrigible" or "wayward" child of liberty. Such requirements do not prevent the state from proceeding against the child but merely require that it surround its intervention with certain protections. It is quite another and a more drastic thing, however, for a court to declare such phrases as "incorrigible" or "wayward" to be unconstitutionally vague. Such a holding deprives the state of its authority to deal at all, at least under its existing statutory standards, with certain types of conduct perceived to require intervention into the child's life.[7]

Not surprisingly, when a legal argument intrudes upon an area which involves substantive reform at either the pretrial or dispositional stage, change is doubly difficult. This Article is concerned with such an area of juvenile law and is devoted to a comparative evaluation of two recent lines of attack on juvenile confinements: the right to treatment theory, which has been conscripted from its origins in the law relating to insane persons and applied in the effort to reform juvenile prisons, and the equal protection theory,[8] which has been applied in a handful of recent cases to invalidate indeterminate sentences for lack of the promised rehabilitative care. Both arguments go to substance: both address the conditions under which a juvenile serves his allegedly rehabilitative sentence, and both represent a response to the widely documented failure of the rehabilitative ideal—the fact that reform schools do not reform. Both assert that a child who receives no treatment is serving an unconstitutional sentence, and both attempt to fashion a remedy for such a child. But while these arguments have some analytical similarity, they are distinct

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[6]*See In re* Gault, 387 U.S. 1, 70-71 (1967) (Harlan, J., concurring and dissenting). *See generally* Glen, *Juvenile Court Reform: Procedural Process and Substantive Stasis,* 1970 WIS. L. REV. 431.

[7]*See, e.g.,* Commonwealth v. Brasher, 270 N.E.2d 389 (Mass. 1971) ("stubborn child" provision not unconstitutionally vague); *In re* L.N., 109 N.J. Super. 278, 263 A.2d 150, *aff'd mem.,* 57 N.J. 165, 270 A.2d 409, *cert. denied,* 402 U.S. 1009 (1970) ("incorrigibility" provison upheld); *In re* Walker, 14 N.C. App. 356, 188 S.E.2d 731 (1971) ("undisciplined child" provision upheld); E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied,* 398 U.S. 956 (1970) ("habitual deportment so as to endanger self or others" provision upheld). *But see* Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.,* 406 U.S. 913 (1972). *See generally* Note, Parens Patriae *and Statutory Vagueness in the Juvenile Court,* 82 YALE L.J. 745 (1973).

[8]*In re* Wilson, 438 Pa. 425, 264 A.2d 614 (1970). See notes 19-25 *infra* & accompanying text.

in fundamental ways. Of the two, the right to treatment theory has received more attention in the literature and in the cases.[9] Significantly, however, this continuing concern with the mechanics of the right to treatment theory and its extension to various areas of the law, has masked the fact that the theory is premised upon fundamental assumptions and fateful choices in respect to a legal attack on juvenile confinements. These assumptions and choices are not necessarily bad, but they are certainly not the only ones available. Indeed, on many of the issues on which the right to treatment and equal protection theories vie, the right to treatment approach, because of its choices, may be self-defeating.

The purpose of this Article is to elaborate upon the fundamental distinctions between the right to treatment and equal protection theories by systematically comparing the *methodologies* employed by each and the *consequences* which follow from faithful adherence to either. In these areas of analysis the literature is silent. Such a study seems justified because important differences attend the choice to contest a juvenile's confinement under one theory or the other, and the typical public defender or legal aid lawyer frequently lacks the luxuries of time or resource to develop fully the implications of competing theories.[10]

I. The Theories Stated

A. *Right to Treatment*

The right to treatment argument proceeds quite simply. Some classes of defendants, the theory notes, are diverted from the criminal justice system because of various conditions of diminished responsibility: drug addiction, mental illness or, most important for present purposes, youth.[11] These "diversions," however, carry their own confinement consequences in the form of an indeterminate rehabilitative sentence, which may be long or short depending upon the individual's response to curative treat-

[9] *E.g.*, *Symposium—The Right to Treatment*, 57 Geo. L.J. 673 (1969); Note, *Judicial Recognition and Implementation of a Right to Treatment for Institutionalized Juveniles*, 49 Notre Dame Law. 1051 (1974).

[10] Public defender or legal aid lawyers do the bulk of juvenile court representation because "the overwhelming number of children processed through the juvenile court are the children of the poor." Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 Calif. L. Rev. 694, 696 (1966).

[11] *See* Goodman, *Right to Treatment: The Responsibility of the Courts*, 57 Geo. L.J. 680, 701 (1969); Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 Geo. L.J. 848, 865 (1969). *See generally* National Institute of Mental Health, Center for Studies of Crime and Delinquency, Civil Commitment of Special Categories of Offenders (Public Health Service Pub. No. 2131, 1971).

ment.[12] Thus, the designated offenders are not altogether diverted from social control, but only from social control attended by punishment, which is inappropriate because of the offender's diminished responsibility.[13] The basis for diversion and the justification for confinement in these cases is the individual's condition and need rather than his act or offense.[14] The authority for confinement is the state's *parens patriae* responsibility to care for those who cannot care for themselves.[15]

However, if the rationale for commitment is that the offender will be treated for his condition rather than punished for his act, treatment must actually be provided. If treatment is not provided, the stated justification for commitment collapses, and the offender's actual commitment in effect becomes indistinguishable from punishment.[16] Punitive confinement is not rationally related to the stated purpose of curing or rehabilitating juvenile offenders. Confinement under punitive conditions is arbitrary and irrational in light of the expressed purpose of the commitment and thus

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[12]The outside limit of a juvenile's confinement under most statutes is age twenty-one. Within the time frame set by the date of commitment and attainment of age twenty-one, a juvenile's sentence is indeterminate in that the precise time of release is determined by an administrative agency and is not limited by the terms of the underlying offense. The younger the child, the longer the potential sentence. Even with the release-at-twenty-one proviso, convicted juvenile offenders are subject to substantial deprivations of liberty under the indeterminate sentencing schemes. *See generally* Chase, *Schemes and Visions: a Suggested Revision of Juvenile Sentencing*, 51 TEXAS L. REV. 673 (1973).

[13]*See* NATIONAL INSTITUTE OF MENTAL HEALTH, CENTER FOR STUDIES OF CRIME AND DELINQUENCY, DIVERSION FROM THE CRIMINAL JUSTICE SYSTEM 4 (Public Health Service Pub. No. 2129, 1971). The notion of a child's diminished responsibility for acts which would otherwise be criminal is formalized in statutes which provide variously that a child shall be deemed incapable of committing a crime or that adjudication of delinquency shall not be deemed a conviction of crime. *E.g.*, MASS. GEN. LAWS ANN. Ch. 119, § 53 (1969); N.J. STAT. ANN. 2A:4-64 (Supp. 1974-75).

[14]*See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 11-16 (1968); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 407 (1958).

[15]*See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1138 (1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967). "Civil" commitment, of which juvenile confinement is an example, can be justified additionally by the state's police power to protect society from the harm which might otherwise be inflicted by the diverted clientele. *Id.* The right to treatment theory, however, seems officially cognizant only of the *parens patriae* rationale for civil confinement and thus exposes itself to considerable criticism. See notes 48-58 *infra* & accompanying text.

[16]*See* Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966).

is violative of due process of law.[17] The right to treatment theorists argue, therefore, that the rehabilitative ideal upon which diversionary confinement is based is not one which the state is free to implement or reject as it sees fit. Rather, the ideal of treatment vests in the offender a constitutional right to treatment and imposes a corresponding duty upon the state to furnish it.[18]

This argument is brilliantly simple in its conception because it avoids the necessity of looking beyond the terms of the commitment statutes to fashion objections to the commitment scheme. The right to treatment theorists accept the rehabilitative framework and terminology in which the problem of juvenile sentencing is expressed and merely insist that the state fulfill the promise implicit in that terminology. Furthermore, the theory is potentially devastating for reasons which will be set forth later in a detailed comparison of the right to treatment and equal protection theories.

B. Equal Protection

There is a marked judicial reluctance to question the theoretical basis of juvenile commitment schemes—to question the adequacy of the classifications by which juvenile offenders are selected for rehabilitative care.[19] In contrast, a few decisions have indicated a willingness to question the administration of juvenile commitment schemes by analyzing the actual conditions under which rehabilitative confinements are served.[20] Thus, the courts are willing to question the application of juvenile sentencing statutes but not the terms of the statutes. Unfortunately, however, this willingness is usually stated as a consolation, rather than as a direct holding, after the court has rejected an attack on the terms of the statute.

In at least two cases, however, the practical failure of rehabilitative theory has served as the basis for a direct holding of a violation of equal protection. In the case of *In re Wilson*,[21] a

[17]Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1140 (1967). *See* Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966).

[18]Although the seminal decision in Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966), was based primarily on statutory grounds and only hinted at constitutional objections, the due process underpinnings of the right to treatment argument are now universally recognized. See notes 9, 11 and 15 *supra*.

[19]For the present writer's attempt to fashion constitutional objections to the juvenile sentencing classifications, see Chase, *supra* note 12.

[20]*See In re* K.V.N., 116 N.J. Super. 580, 597-98, 283 A.2d 337, 346-47, (1971); Smith v. State, 444 S.W.2d 941, 948 (Tex. Civ. App. 1969).

[21]438 Pa. 425, 264 A.2d 614 (1970). *Cf.* Commonwealth v Daniels, 430 Pa. 642, 243 A.2d 400 (1968); United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968).

sixteen-year-old was committed to a state institution for an indeterminate period which was not to exceed his twenty-first birthday, a period of five years, while an adult convicted of the same offense could have received a maximum sentence of four years. The institution to which the juvenile was committed housed both juvenile and adult prisoners. The court in *Wilson* held that this commingling of juveniles and adults violated the fourteenth amendment guaranty of equal protection and stated that there is "no constitutionally valid distinction between a juvenile and an adult offender which justifies making one of them subject to a longer maximum commitment in the same institution for the same conduct."[22] A similar holding was reached in *People ex rel. Meltsner v. Follette*[23] when a juvenile who was originally confined to a separate institution was transferred to an adult penal institution.

The logic of the holdings in *Wilson* and *Meltsner* develops as follows. The argument supporting juvenile commitment schemes is that a juvenile's youthfulness, which subsumes elements of diminished responsibility as well as malleability and susceptibility to treatment, furnishes a rational basis for subjecting him and not the adult to the indeterminate rehabilitative sentence. An age classification thus "reasonably" relates to the rehabilitative purpose of providing protection, care and curative treatment for those offenders who most need and can most benefit from rehabilitation. A juvenile may be accorded a different and if necessary a longer sentence because he is situated differently from an adult with respect to the rehabilitative purpose.[24] If rehabilitative care is not forthcoming, however, the reasoning which predicates different dispositions for the juvenile and the adult on their rehabilitative dissimilarity collapses. Absent rehabilitation, confinement of a juvenile for his commission of a crime, like confinement of an adult, becomes a form of punishment. In the context of punishment rather than rehabilitation, a juvenile's reputedly lesser responsibility and greater susceptibility to treatment, the basis for an extended juvenile rehabilitative sentence, become irrelevant; in all relevant particulars relating to punishment, juveniles and adults are similarly situated. Thus, a juvenile's sentence cannot constitutionally exceed an adult's sentence on the basis of differences which have no relation to the

[22]438 Pa. at 431, 264 A.2d at 617.

[23]32 App. Div. 2d 389, 302 N.Y.S.2d 624 (1969).

[24]*See id.* at 390, 302 N.Y.S.2d at 626; Smith v. State, 444 S.W.2d 941, 945 (Tex. Civ. App. 1969).

punitive purpose actually being implemented.[25] The necessary result of this reasoning is that, absent rehabilitation, a juvenile may be detained for no greater period than an adult convicted of the same crime.

II. The Methods of Each Theory: The Structure of Proof

In their attempts to determine the validity of a juvenile's commitment, the equal protection and due process right to treatment arguments are similar in focus. Both question whether a juvenile is actually receiving the asserted rehabilitative care. However, the arguments differ markedly in their methods of proving the failure of the rehabilitative ideal, in their results once this failure is demonstrated, and in their appeal to and exploitability by the judiciary. Because of these differences the choice of whether to view the question of adequacy of rehabilitative facilities in terms of equal protection rather than due process has decisive consequences. The present section will focus on the methodological differences.

A. Vertical and Horizontal Perspectives

In determining whether a juvenile's right to treatment is being accorded, courts must assess the adequacy of the facilities which provide such treatment. In *Rouse v. Cameron*,[26] the leading statement, the court dictates that the right demands treatment "which is adequate in the light of present knowledge."[27] Although this general statement elicits agreement, lively controversy continues over the appropriate standard for specifically determining the "adequacy" of treatment. Under an objective standard, treatment is adequate if minimum numerical standards for staffing and physical facilities are met: physician-inmate ratio, number of physician-inmate consultations, and what is generally and perhaps tautologically referred to as "adequacy of physical facilities."[28] If these criteria are met, their actual beneficial impact on an inmate is left to a convenient and rather large inference.[29] Under a subjective standard, however, the inference itself

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[25]*See* People *ex rel.* Meltsner v. Follette, 32 App. Div. 2d 389, 390-91, 302 N.Y.S.2d 624, 626-27 (1969). *Cf.* Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964).

[26]373 F.2d 451 (D.C. Cir. 1966).

[27]*Id.* at 456.

[28]Birnbaum, *A Rationale for the Right*, 57 Geo. L.J. 752, 753-57 (1969).

[29]*See* Tribby v. Cameron, 379 F.2d 104, 105 (D.C. Cir. 1967), in which the court stated:

We do not suggest that the court should or can decide what par-

must be addressed; although the subjective standard does not require a cure, it does insist that a bona fide effort be made to mold the objective facilities into a program suited to the particular needs of an individual inmate.[30]

Advocates of each standard are quick to point out the deficiencies of the other. The objective standard may well fail to secure the very right in whose service the standard is adopted[31] since there is no assurance that the numerical minimums sanctioned by the objective standard will in any way benefit the individual offender. The alternative subjective standard, however, is necessarily imprecise because of medical disagreement on the nature of mental illness[32] and perforce on the appropriate treatment modalities. It correspondingly invites and requires a battle of experts to establish which treatment method is best in the case before it[33] and, consequently, results in judicial second-guessing that one group of experts is incorrect in its evaluation.[34]

Regardless of whether the objective or subjective standard is used, however, the right to treatment theory forces reliance on what one may designate a vertical measurement. Thus, the right to treatment theory evaluates the adequacy of treatment either against an ascertainable but perhaps self-defeating objective yardstick, or against a potentially valuable but unascertainable and easily manipulable subjective evaluation. In neither case does the theory refer or compare the alleged treatment received by the juvenile to that received by any other specific class of offenders. By contrast, as *Wilson* and *Meltsner* suggest, the measurement in equal protection analysis, which by definition is concerned with the question of parity between classes, is horizontal and compares the disposition accorded a juvenile with that accorded an adult offender. Since a criminal act is frequently the fulcrum for a juvenile's commitment, it is entirely appropriate to measure this commitment against that accorded adults for the same criminal act.

Because of this measure the equal protection argument is more productive for challenging juvenile confinements, regard-

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ticular treatment the patient requires . . . . We . . . only make sure that it has made a permissible and reasonable decision in view of the relevant information and within a broad range of discretion.

[30]*See* Rouse v. Cameron, 373 F.2d 451, 456 (D.C. Cir. 1966); Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968).

[31]*See* Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 792 (1969); Rothman, *Decarcerating Prisoners and Patients*, 1973 CIVIL LIBERTIES REV. 8, 25.

[32]*See* Birnbaum, *supra* note 28, at 759, 774.

[33]*See* Halpern, *supra* note 31, at 793.

[34]*See* Birnbaum, *supra* note 28, at 753.

less of whether an objective or subjective measure is used in assessing the adequacy of the facilities provided by the state. When the objective standard is employed in the right to treatment analysis, a juvenile's claim fails whenever a certain minimum standard for adequate facilities is met. In the equal protection analysis, establishing that the juvenile institution meets such a minimum standard does not end a court's inquiry. If adult facilities in the jurisdiction are significantly similar in these objective terms, a juvenile's claim of a denial of equal protection must prevail.[35] Even though the juvenile is in some sense receiving treatment, his treatment is essentially identical to that accorded an adult. Thus, any rational basis for giving a juvenile a longer sentence predicated upon his receiving treatment different from that associated with the criminal sentence which ordinarily would attach to his crime vanishes.[36]

Similarly, if the subjective standard is used and a program is provided for an individual which is or can be said to be "adequate" to his needs, then the juvenile's claim fails if based upon the right to treatment argument. In equal protection analysis, however, the provision of individualized programs again does not terminate a court's inquiry. If adults in criminal institutions also have the benefit of individualized programs, the juvenile confinement again appears to be constitutionally invalid. A juvenile's supposedly lesser responsibility and greater susceptibility to rehabilitation is the rational basis for selecting him over an adult for participation in the rehabilitation process. This, however, is not a rational basis for extending a juvenile's term beyond that of an adult when their sentences are served under identical conditions. In fact, if a juvenile and an adult receive the same treatment, the juvenile's supposed malleability should suggest, if anything, that he receive a shorter term because he may well be re-

[35]*See In re* Wilson, 438 Pa. 425, 264 A.2d 614 (1970). In *Wilson* the court stated that a "central premise of the Juvenile Court Law is that the post-adjudication treatment of the juvenile delinquent is somehow different from and better than that which the adult offender must endure." *Id.* at 432 n.6, 264 A.2d at 618 n.6. *See generally Hearings on S. Res. 32 Section 12 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971).

[36]*See* People *ex rel.* Meltsner v. Follette, 32 App. Div. 2d 389, 302 N.Y.S.2d 624 (1969). In *Meltsner* the court emphasized that the state may not "confine a reformatory inmate for a period greater than the maximum to which a prison term inmate convicted of the same crime is subject, unless the basis for distinguishing between the two persons continues to exist." *Id.* at 391, 302 N.Y.S.2d at 626. The court held that transfer of the inmate to an adult institution destroys the distinguishing basis.

formed more quickly than the adult.[37] At the very least, the equal protection theory permits the assertion of the offender's right to receive either the treatment which justified the extended sentence or a definite sentence.[38]

In short, the equal protection analyst, unlike the right to treatment theorist, does not hostage his success to a court's willingness to evaluate the state's rehabilitative facilities according to some subjective but elusive, or some objective but abortive, standard of "treatment." A determination that facilities are adequate by either of these standards is not sufficient to uphold commitment unless a court reaches and decides the further question of similarity of juvenile and adult facilities. If a comparison determines the facilities to be significantly similar,[39] a juvenile's commitment fails the equal protection test of adequacy. Moreover, as will be set forth below,[40] the inadequacy of facilities can be proved under the equal protection argument with relative ease and precision in comparison to the probative difficulties inherent in the right to treatment theory. Finally, a court employing the equal protection approach need not engage in second-guessing expert evaluation of treatment methods. The question is not whether one set of experts is right and another wrong in its diagnoses and prognoses concerning treatment of the defendant, but whether the

[37]*See* Baum & Wheeler, *Becoming an Inmate*, in CONTROLLING DELINQUENTS 153, 183 (S. Wheeler ed. 1968); S. RUBIN, CRIME AND JUVENILE DELINQUENCY 69-70, 102, 124 (1958).

[38]Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1145-46 (1967).

[39]The mechanics of determining that facilities are "substantially similar" is the subject of the next section. "Substantial similarity" is not, of course, a precise test, and a court bent on upholding a juvenile's commitment at all costs may seize upon relatively minor differences between juvenile and adult institutions, elevate them to the level of "substantial dissimilarity," and thereby defeat the equal protection claim. Hopefully, this danger is not too great since the equal protection argument, unlike the right to treatment theory, presents itself in such a way as inherently to minimize the judiciary's reluctance to tamper with juvenile commitments. See notes 48-58 *infra* & accompanying text. But in any event, there are compelling reasons for using a "substantial similarity" test. First, the conditions to be compared in juvenile and adult institutions are likely to be too numerous to catalog easily or profitably; the test of "substantial similarity" is intended to suggest that it is the overall *quality* of the confinement experience, as revealed in part by those conditions, that is the proper judicial focus—rather than a wooden insistence on an absolute equivalence of beds, locks, and the like. Secondly, the test of "substantial similarity" has been stated in the case law. *See* Smith v. State, 444 S.W.2d 941, 948 (Tex. Civ. App. 1969). Thus, a court wishing to implement the arguments advanced in this Article will find precedential support for doing so.

[40]See section B *infra*.

available programs at juvenile and adult institutions are significantly similar.

B. The Horizontal Perspective: Proving the Case

The indeterminate juvenile sentence should be invalid unless a child receives care significantly different from and better than that which an adult confined for the same crime would receive. Absent such better treatment, a juvenile must receive a determinate sentence which may not exceed that which would be imposed upon him if he were an adult. In seeking to implement this equal protection principle, a court must look to the quality of the commitment experiences of juvenile and adult inmates in order to determine whether their experiences are substantially similar.

The first circumstance in which the equal protection principle must be employed was established by *Wilson* and *Meltsner*. Whenever juvenile and adult offenders are commingled in the same institution,[41] a decision limiting a juvenile sentence to that of an adult must be reached. Such commingling is against the express language of some juvenile court statutes[42] and is against the spirit of all. All juvenile statutes seek to insulate a child from the consequences, and by implication from the perpetrators, of adult crime: adjudication of delinquency is not deemed a criminal conviction, commitment entails no loss of civil rights, and a child has no record of arrest or conviction to prejudice future sentencing or employment decisions.[43] The prohibition against commingling has a compelling correctional basis. Constant, and perhaps even casual, association of juvenile and adult offenders—at mealtime, during recreation and in sleeping quarters—is thought to undo any beneficial effect that rehabilitative efforts directed toward the child may have; the treatment contingencies are in danger of being frustrated, on a daily basis, by the child's asso-

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[41] Published reports indicate that commingling is far more common than the number of reported cases might suggest. *See, e.g.*, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 131, 135 (Washington, D.C., August, 1971); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINSTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 6 (1967); DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL AND REHABILITATION SERVICE, CHILDREN'S BUREAU, DELINQUENT CHILDREN IN PENAL INSTITUTIONS (Pub. No. 415-1964).

[42] *E.g.*, ARIZ. REV. STAT. ANN § 8-207 (B) (1974); D.C. CODE ENCYCL. ANN. § 16-2320(e) (1966).

[43] *E.g.*, N.J. STAT. ANN. § 2A:4-64 (Supp. 1974-75); *see* Comment, *Youthful Offenders and Adult Courts: Prosecutorial Discretion vs. Juvenile Rights*, 121 U. PA. L. REV. 1184 (1973).

ciation with offenders for whom different treatment modalities or, more likely, none at all are being provided.[44]

It is thus perfectly appropriate for a court, as in *Wilson* and *Meltsner*, to implement the explicit or implicit statutory prohibition against commingling by translating an indeterminate juvenile sentence into a determinate sentence. Such a holding insures that a child who suffers the same conditions of confinement as an adult correspondingly serves no longer sentence than the adult. The facts which are necessary to justify such a holding are the presence of adult prisoners in the institution to which juveniles are confined and the opportunity for contact between juvenile and adult inmates. The presence of adult prisoners may be proved by testimony of the institution's administrators, by commitment records showing the ages of its inmates, or by judicial notice if the facility is predominantly an adult facility. The opportunity for contact may be proved by testimony of the juvenile, other inmates, or the institution's staff or administration, as to eating, sleeping or recreational arrangements.

Wilson and *Meltsner*, however, represent the clearest, but by no means the exclusive, opportunity for the application of the equal protection determinate sentence principle. The second and probably more common class of situations occurs when a child is housed in facilities separate from those provided for adults and receives ostensibly different treatment. Such situations may arise when a juvenile is housed in a separate wing of a building where adult prisoners are housed, in a separate building of an institutional plant containing buildings where adult prisoners are housed, or in completely independent facilities. It is the absence of contact between juvenile and adult inmates and the presence of separate treatment programs for juveniles which serve to place this second class of situations in a category analytically distinct from that involved in *Wilson* and *Meltsner*. In these latter situations, a court must compare the physical facilities and the treatment programs available to the institutionalized child to those available to the institutionalized adult in order to determine whether they are substantially similar.

Two approaches may be utilized to accomplish the necessary probative presentation. First, testimonial evidence of various sorts may be introduced.[45] Thus, the juvenile himself, the staff

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[44]*See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2-3 (1967); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1368 (D.R.I. 1972).

[45]If testimonial evidence were unavailable during the trial, depositions or interrogatories could be utilized. Since the equal protection inquiry is

and administrators of juvenile and adult institutions, and adult prisoners may provide evidence as to the similarity of the physical facilities of the institutions in question. The existence and use of guards, gun-towers, barred doors and isolation units, among other things, may be proved to establish the nature of the institutions as primarily penal rather than rehabilitative. The ratio of guards and other management personnel to the number of inmates and therapeutic personnel may be explored in order to discount the possibility that any meaningful rehabilitation occurs in the juvenile institution as compared to that which occurs in the adult institution. The presence or absence of work release, school release, or other programs which seek to reintegrate the offender into the community also may be proved to determine whether the juvenile has the actual benefit of his presumably better rehabilitative sentence. Finally, expert testimony from penologists familiar with conditions in the juvenile and adult institutions may be introduced to establish qualitative comparisons of treatment programs. However, unlike the right to treatment theory, the equal protection theory does not require a court to venture into the psychological or medical thicket of the etiology of criminal behavior or its appropriate treatment modalities. Thus, a court will ask experts to express their opinions only on the similarity of two concrete situations—the programs prevailing in the juvenile and the adult facilities.

Secondly, demonstrative evidence may be introduced. For example, photographs showing the exterior and interior of the institutions and establishing dimensional comparisons of eating, sleeping and recreation facilities may be employed.[46] Maps and diagrams also may be used for these purposes. Finally, a court seeking a forthright estimation of the comparative conditions may choose to view the institutions in question.

In summary, when conditions of confinement are compared to other conditions of confinement rather than analyzed for their intrinsic reliability, the necessary evidence can be produced by affidavits, depositions, photographs and maps, testimony from interested parties, and only minimal expert testimony. These are all forms of evidence with which a court routinely deals and with which a court is thoroughly familiar and comfortable. The question of what specifically is needed to rehabilitate juveniles is an inherently unstructured inquiry and leaves a court lost; but it is an indispensable inquiry under the right to treatment theory.

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likely to arise upon a habeas corpus petition, a civil proceeding, free use of such discovery is permissible.

[46] *See* McCormick's Handbook of the Law of Evidence § 214, at 530-31 (2d ed. E. Cleary 1972).

By contrast, the equal protection theory avoids the question of the extent of the state's affirmative duty to provide rehabilitative facilities satisfactory to meet an adequacy of treatment test. It simply demands that a state not treat a juvenile like an adult under the guise of rehabilitation by hanging a sign saying "hospital" over what is essentially a prison.[47]

III. The Results of Each Theory

Another crucial difference between the equal protection and the right to treatment approaches lies in the result dictated once the juvenile facilities are declared inadequate. The right to treatment theorists assert that if treatment is not provided the indeterminate confinement must collapse. However, they are not saying that only the additional commitment beyond that provided in the substantive offense is invalid if treatment is not forthcoming. Although this thread of the right to treatment argument is rarely made explicit, the thrust of the argument is that *no* commitment is valid if treatment is not provided.[48] Thus, the entire sentence, which is predicated on treatment, and not merely the excess sentence, fails in the absence of treatment. Absent treatment, the juvenile must be released if he has begun to serve his sentence, even if he has not fully served the sentence imposed by statute. If it can be established at the dispositional hearing that no rehabilitative facilities adequate to fulfill the rehabilitative ideal are present in the state, then it would appear that no valid order of commitment can be made. The juvenile must be released, or a non-commitment alternative must be used. If the state has no rehabilitative facilities, it has no theoretical justification for confinement.

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[47] *Cf.* Powell v. Texas, 392 U.S. 514, 529 (1968). The right to treatment theory could rely upon the horizontal perspective to prove its case. Under this view the state's commingling of the child and adult, or its failure to provide different conditions of confinement for the child, would be a denial of the right to treatment. But even if it lessened its probative difficulties by borrowing the horizontal equal protection perspective, the right to treatment theory would still face intense judicial resistance because the logic of its challenge, however proved, is that the child must be released if no treatment is provided.

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> If courts are to fully strip away the facade of legislative hypocrisy, they must treat any length of confinement without treatment as a denial of due process of law, for the lack of responsibility which triggered the confinement purportedly rendered all criminal punishment inappropriate. The justification for confinement is lacking as much in the first year as it is in the next three.

Goodman, *supra* note 11, at 690.

The right to treatment theory is thus potentially devastating because both compliance and noncompliance with its terms places the state in a desperate position. Compliance with the demand for a good faith effort to provide reasonable treatment, at least under the subjective view, would require the state to implement a wholesale improvement of its juvenile detention system. Thus, the state would incur a massive expenditure of resources which either are not available or cannot, considering public resistance, be devoted to a system for dealing with junior "criminals." Failure to provide treatment, however, destroys the state's authority to intervene at all into the juvenile's life by way of commitment.[49]

The right to treatment theory makes the fateful choice to address the problem of juvenile commitment solely in the terms ("rehabilitation" and "treatment") presented by the statutes and by prevailing juvenile court philosophy. Rehabilitation under the *parens patriae* authority is the only stated basis for confinement, and the only accepted basis in the right to treatment theory.[50] When rehabilitative care is not provided, confinement is invalid. The right to treatment theory thus has no conceptual apparatus to deal with a very pressing practical problem. The theory recognizes the need for treatment as the only basis for the confinement of a juvenile offender. It recognizes the juvenile court as the state agency which certifies a child for the rehabilitative process. Suppose, however, that the motivation behind a court's decision to commit a child is not his need for treatment, but the threat, signified by the conduct with which he is charged and perhaps his past record, which he poses to the community. Conceptually, dangerousness is a different basis for incarceration than is need for treatment.[51] An indeterminable but probably very large

[49]It has been suggested that as an alternative to immediate release, a court using the right to treatment theory might order either prospective release conditional upon the institution's failure to improve treatment or transfer to an institution which will provide treatment. *See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1158 (1967). These alternatives do not remove the distinction between the right to treatment and equal protection theories in terms of the point under discussion—the result dictated by each theory when treatment is not provided. The alternatives simply are attempts to determine finally whether treatment *can* be provided. In any event, it is doubtful whether these alternative remedies will benefit the juvenile since both are predicated on an assumption which the very initiation of a right to treatment challenge seems to deny—that the state has, can come up with, or is willing to employ adequate facilities for the treatment of children in trouble with the law.

[50]*See, e.g.*, Kittrie, *supra* note 11, at 870, 882; Note, *Judicial Recognition and Implementation of a Right to Treatment for Institutionalized Juveniles*, 49 NOTRE DAME LAW. 1051 (1974).

[51]*See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1138 (1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*,

number of juvenile offenders commit crimes as a perfectly normal response to their social conditions rather than as an expression of an individual pathology to which treatment, even if adequate, might be directed.[52] When a juvenile court deals with such children and confines them, it functions not as a rehabilitative agency, but as an ordinary criminal court. It asserts the norms and standards of the community against conduct which is perceived as a threat to community safety, and it protects the community from such conduct through the temporary incapacitation of the child.[53] The juvenile court in these instances represents values at odds with the values of benevolence and humanity which are isolated and emphasized by the right to treatment theory.

These observations are intended neither to diminish the devotion of juvenile courts to the rehabilitative ideal, nor to suggest that no ameliorative effort at all should be directed to such individuals during their incarceration. These remarks, however, are intended to suggest that lack of treatment during confinement does not remove the state's right to confine. A person who violates the law may legitimately be subjected to some form of intervention for purposes of deterrence or incapacitation, and intervention in the form of imprisonment seems reasonably related to such a purpose. The only meaningful legal relief for such offenders is an assurance that they will not be confined, under the guise of "treatment" which they neither need nor want, for a longer period than an adult who commits the same crime. It is that relief which the right to treatment theory cannot provide.[54]

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77 YALE L.J. 87 (1967). *See generally* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966).

[52]*See* F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 51-52 (1964); Kittrie, *supra* note 11, at 858, 882.

[53]*See* F. ALLEN, *supra* note 52, at 52-56. Caldwell, *The Juvenile Court: Its Development and Some Major Problems*, in JUVENILE DELINQUENCY: A BOOK OF READINGS 399 (2d ed. R. Gaillombardo 1972).

> [B]y no stretch of the imagination can what actually happens to the child during [the dispositional phase of the] process be called merely treatment. Thus the action of the court involves both community condemnation of antisocial conduct and the imposition of unpleasant consequences by political authority—the two essential elements of punishment. It is, therefore, highly unrealistic to say that the court treats, but does not punish the child. What it really does is to emphasize treatment in a correctional process which includes, and of necessity must include, both treatment and punishment.

Id. at 419.

[54]Some juveniles perceived as dangerous by a juvenile court judge are likely candidates for waiver to adult court. This group primarily consists of those charged with serious offenses against persons, *e.g.*, murder, rape, or armed robbery, or against property, *e.g.*, arson. *See* Comment, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*,

In short, the sentencing decision is too complex and involves too many variables to be captured by the right to treatment theory's one-dimensional perception of the juvenile dispositional phase as a purely rehabilitative process.[55]

The implacable logic of the right to treatment theory is its undoing. No court which has in the first instance opted for commitment rather than probation in order to protect the community will accept an argument whose logic invalidates commitment. The tension between the necessity for confinement and the demand for release is most likely to be eased by a judicial dilution of the notion of "treatment," to the extent that almost any state effort at all will pass muster against a right to treatment challenge. This appears to have occurred.[56] Such a result comfortably immunizes a juvenile's confinement from attack and manifestly deprives him of any benefit; he gets neither a reduction in the length of his sentence nor an improvement in the conditions under which he serves it.

A court resolved on commitment, however, may, without having to confront the tension generated by the right to treatment

16 ST. LOUIS U.L.J. 604, 609-13 (1972). Since waiver would remove the possibility of advancing either a right to treatment or equal protection argument in juvenile court, the difference between the two theories may have little practical import as to these offenders. There remain, however, numerous offenders whom a judge may be disposed to confine because of their threat to community safety although they are not obvious candidates for waiver. Chronic joy-riding, unauthorized use of an automobile, assault and battery, and drug and sex offenses present the most likely of such cases. But any offender whom the judge merely wants off the street, even though the possibility of treatment appears slight, would qualify. As to these offenders the right to reatment argument is conceptually impotent. Its advocates cannot argue successfully against either the fact or the conditions of commitment on the ground that there is little likelihood that treatment will be successful, since it is dangerousness rather than need for treatment which initially prompted the commitment.

[55]One may argue that the juvenile court is more concerned with "rehibilitation" of a total condition, however caused, than with "treatment" for a particular set of disturbing conditions. Thus, even those confined for dangerousness would come within the conceptual shelter of a "right to rehabilitation." Right to treatment theorists who have addressed the issue, however, seem to insist upon a right to some form of specific "treatment" rather than a generalized right to "rehabilitation." *E.g.*, Note, *Judicial Recognition and Implementation of a Right to Treatment for Institutionalized Juveniles*, 49 NOTRE DAME LAW. 1051, 1054 (1974). *See* D. GIBBONS, CHANGING THE LAWBREAKER: THE TREATMENT OF DELINQUENTS AND CRIMINALS 130 (1965). Moreover, even taking the broadest view of the juvenile court system's "rehabilitative" function, there will remain individuals who elude the court's capacity for help. *See* F. ALLEN, *supra* note 52, at 51-52. As to those offenders, the right to treatment theory affords no help.

[56]*See* Halpern, *supra* note 31, at 790; Pyfer, *The Juvenile's Right to Receive Treatment*, 6 FAM. L.Q. 279, 281 (1972).

theory, accept an argument which acknowledges that confinement per se is not invalid even when adequate rehabilitative facilities are not present in the state. The equal protection argument makes this acknowledgement. It recognizes "rehabilitation" not as the basis and justification for commitment itself, but only for the disparity between the lengths of the juvenile and the adult sentences. Failure of rehabilitation, therefore, does not destroy the reason for the sentence itself but only destroys the reason for distinguishing between juveniles and adults and for treating them differently.[57] Whatever legitimate purposes commitment might serve apart from rehabilitation are left unscathed and indeed are validated by the equal protection attack. *Wilson* is clear on this point.[58]

IV. The Applicability of Each Theory

The aim of the preceding remarks has not been to discredit the right to treatment theory. Such an attempt in any event would be futile. The impulses of benevolence and humanity which the theory seeks to insure in the juvenile correctional process are too deeply rooted in the correctional psyche to be removed, and the amount of face-saving necessary if the juvenile system were to concede that its promises of treatment are a pious fraud is simply too large to contemplate. Thus, official assurances of treatment will continue, as will demands by lawyers that treatment in fact be provided. What this Article has attempted to suggest, however, is that an appreciation of the right to treatment theory must be tempered with a cool appraisal of its defects. For the practicing lawyer, such an appraisal may well lead to the conclusion that an equal protection, rather than a right to treatment, argument is the more viable for his client. The probative problems are less severe, and the outcome is more palatable to courts.

But any comparative evaluation of the two theories would be remiss if it failed to indicate those dispositional situations in which the equal protection argument should not be substituted for the right to treatment theory. At least two such situations exist. The first is the situation in which a child's confinement until age twenty-one translates into a *shorter* sentence than he would have received had he been sentenced in an adult court. Such a situation arises when a child is adjudicated delinquent for

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[57] *See* People *ex rel.* Meltsner v. Follette, 32 App. Div. 2d 389, 390, 302 N.Y.S.2d 624, 626 (1969).

[58] "It is our view that there can be no constitutionally valid distinction between a juvenile and an adult offender which justifies making one of them subject to *a longer maximum commitment* in the same institution for the same conduct." 438 Pa. at 431, 264 A.2d at 617 (emphasis added).

the more serious crimes against persons and property, which usually carry lengthy sentences. It will be recalled that the equal protection theory outlined in *Wilson* was predicated upon the juvenile's receiving a longer sentence than an adult convicted of the same crime. It is entirely appropriate to concentrate on and develop an analytical theory for the cases in which the juvenile's confinement exceeds the adult's. Statistics indicate a substantial incidence of confinements in which the sentencing differential is likely to be disadvantageous to the child,[59] and cases such as *Wilson* and *Meltsner*, as well as cases in which relief was denied,[60] dramatize the problem. Other situations exist, however, in which the sentencing differential works to the child's advantage, and an equal protection attack on the conditions and length of sentence as developed in *Wilson* is inappropriate. In this situation a child has no cause to complain about his lesser sentence. Any attack on the conditions of the sentence must proceed by way of the right to treatment theory. This limitation on the application of the equal protection theory, however, should not be overemphasized. Many cases in which equal protection is not a viable argument because of the severity of the underlying offense will be the very cases in which the state will seek waiver of the child to an adult court.[61] If the juvenile is successfully waived to an adult court, the differences between the impact of the right to treatment and the equal protection arguments in the juvenile court become irrelevant.[62]

The second situation in which the equal protection argument may be inappropriate is in the area of adjudications based upon noncriminal conduct. Juvenile court jurisdiction under all statutes extends to conduct which violates the state's criminal law and to conduct, designated by such terms as "incorrigibility" or "waywardness,"[63] which is illegal only for children. The touchstone

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[59]*See* Chase, *supra* note 12, at 676-79.

[60]*E.g.*, State v. Pitt, 28 Conn. Supp. 137, 253 A.2d 671 (Super. Ct. 1969) (possible juvenile commitment of two years for offense carrying one year penalty); State v. Pinkerton, 186 Neb. 225, 182 N.W.2d 198 (1970) (six years for six month offense); *In re* K.V.N., 116 N.J. Super. 580, 283 A.2d 337 (1971) (four years for six month offense); *Ex parte* Watson, 157 N.C. 340, 72 S.E. 1049 (1911) (five years for thirty day offense); State v. Cagle, 111 S.C. 548, 96 S.E. 291 (1918) (thirteen years for ten day offense).

[61]See note 54 *supra*.

[62]Waiver is possible in most states and frequently has devastating consequences for the child. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 24-25 (1967); S. FOX, CASES AND MATERIALS ON MODERN JUVENILE JUSTICE 767 (1972).

[63]*See* S. FOX, *supra* note 1, at 38-42.

of the equal protection argument is the adult's criminal sentence.[64] If there is no adult sentence against which a child's sentence can be matched, the equal protection argument would appear to lose a necessary conceptual component. There are, however, two ways in which this conceptual difficulty could be redressed, although neither is entirely satisfactory.

First, the equal protection theorist could contend that the differential sentencing problem is caused not by the length of the child's sentence for incorrigibility or waywardness but by the mere fact of that sentence. If no treatment is provided, any sentence at all would appear to deprive the child of equal protection, since in being confined he is being treated differently from the adult on the basis of a rationale which does not materialize in fact. This argument, of course, is nothing more than a right to treatment argument presented in equal protection terms, and its all-or-nothing treatment or release approach would suffer from all the objections which were advanced earlier to the right to treatment theory. A second method of extending the equal protection argument to adjudications based upon noncriminal conduct would be to analogize such conduct to adult offenses. Juvenile offenses such as incorrigibility or waywardness as statutorily elaborated or judicially interpreted are in many respects simply the equivalent of the adult offenses of disorderly conduct or vagrancy. If a valid statute exists covering such offenses, a court could use the penalty designated therein for purposes of implementing an equal protection argument.

V. Conclusion

The impulse behind the right to treatment theory, that the committed juvenile should be treated or released, is commendable. The juvenile court system promises treatment, and it is thus legitimate to expect and to seek to insure that this promise is honored. However, the choice of questioning the problems of juvenile commitment exclusively through a right to treatment argument is in many instances an unfortunate one. The choice entails acceptance of the emotive terminology of present juvenile court statutes and commits the right to treatment theorists and the courts to the course of attacking what should be a fairly manageable legal problem on the medical battlefield. Specifically, the right to treatment theorists subsume a fairly precise problem of constitutional law—whether differential sentencing of persons

[64]In reiteration, the argument states that if rehabilitative treatment is not provided, a child convicted of a crime may not be confined for a longer period than an adult convicted of the same crime.

who have committed the same crime is valid if the conditions of confinement are the same—under the largely imprecise and unmanageable rubrics of "treatment" and "rehabilitation." For reasons indicated in this Article, this approach is often impractical and futile.

Hopefully, courts will move from their questionable view of the juvenile court as a unique sui generis system with rationales and operations totally different from those of conventional criminal courts, toward a more realistic view. The right to treatment theorists pretend that one important function of the juvenile court system, the rehabilitation of the child in trouble with the law, is the only function of the juvenile court system. It is not. A juvenile court is a *court*, and it is also a *criminal* court; it deals with children who are charged with criminal offenses, and it visits involuntary and often unpleasant consequences upon such conduct. Much of the difficulty and resistance encountered in attempts to inject constitutional protections into the juvenile court system might disappear if proponents of that system would recognize that the rehabilitative function does not exhaust the juvenile court's purposes. The process of redefining the juvenile court to include its criminal functions was begun in the case of *In re Gault*.[65] In *Gault* the Court imposed procedural requirements on the adjudicative, or guilt-determining, phase of the process commensurate with the criminal function which the juvenile court was perceived to perform at that stage. This process should be continued and extended to the pretrial and dispositional phases of the process. It is hoped that this Article has made a modest contribution to that effort.

[65]387 U.S. 1 (1967).

Notes

Parental Tort Immunity Doctrine in Indiana

> *It is well established that a minor child cannot sue his parent for a tort. The peace of society . . . and a sound public policy, designed to subserve the repose of families . . . forbid to the minor child a right to appear in court in the assertion of a claim of civil redress for personal injuries suffered at the hands of the parent.*[1]

Thus, the doctrine of parental immunity was adopted in *Smith v. Smith*,[2] a 1924 Indiana decision. Prior to that case, the doctrine had been construed only once in Indiana to the extent necessary to hold it inapplicable to the facts at hand.[3] Since the *Smith* decision, the immunity doctrine has not arisen in any reported Indiana case. Despite the dearth of cases on point, the doctrine is by no means unassailable in this state. In view of the public policy statements in *Brooks v. Robinson*[4] and *Campbell v. State*[5] as well as numerous cases in other jurisdictions, the

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[1]Smith v. Smith, 81 Ind. App. 566, 568, 142 N.E. 128, 129 (1924), *quoting from* 20 R.C.L. 631 (1918), *quoting from* Hewlett v. Ragsdale, 68 Miss. 703, 711, *reported sub nom.* Hewelette v. George, 9 So. 885, 887 (1891).

[2]81 Ind. App. 566, 142 N.E. 128 (1924). This was an action by an adult son against his father for damages sustained during minority, arising out of acts alleged to be cruel and malicious. The court held that the son could not sue the father for personal torts committed during minority. *See also* 4 B.U.L. REV. 217 (1924); 8 MINN. L. REV. 451 (1924).

[3]Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901). This was an action by a minor child against her stepmother, who allegedly stood in loco parentis, for injuries sustained during minority as a result of acts of personal violence. The court held that the stepmother was not relieved of liability for a malicious assault on the child because she stood in loco parentis.

[4]284 N.E.2d 794 (Ind. 1972). Appellant was injured while a guest in a car being driven by appellee. While the action was pending, the parties were married. The trial court dismissed the complaint, citing the interspousal immunity doctrine as a bar to the action. The Indiana Supreme Court, per Justice Hunter, reversed the trial court, reinstated the complaint, and abrogated the doctrine. *See also* 6 IND. L. REV. 558 (1973).

[5]284 N.E.2d 733 (Ind. 1972). Appellants sustained personal injuries as a result of a head-on collision with a car traveling in appellants' lane on a state-maintained highway. Appellants alleged negligence by the state in failing to mark the road with a yellow line signifying that it was not safe

doctrine is ripe for abrogation. The two fundamental bases for the doctrine were severely criticized in these cases, although with regard to other tort immunity doctrines. The preservation of domestic peace and harmony was held in *Brooks* to be an insufficient reason on which to base an interspousal tort immunity.[6] The desire to minimize fraudulent claims was held in *Campbell* to be outweighed by the fundamental injustice of a tort immunity policy.[7] Consequently, it is necessary to re-examine the origins of the parental immunity doctrine and the reasons both for its support and for its abrogation to determine if such an immunity retains any continued vitality.

I. Development of the Doctrine

A. Common Law

The earliest American decisions recognizing the parental immunity doctrine state that its existence is to be traced to the common law and is so basic to our legal structure that it scarcely requires support.[8] However, many courts[9] and noted writers[10] have examined this assertion and found it to be clearly erroneous.

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to pass and failing to install no-passing signs. The Indiana Supreme Court held that the sovereign immunity doctrine could not be used to protect the state when justified by a governmental-proprietary characterization of the negligence. *See also* Lockyear, *Torts, 1973 Survey of Indiana Law*, 7 Ind. L. Rev. 262 (1973).

[6]284 N.E.2d at 796. Justice Hunter stated:

> In regard to the [domestic tranquility argument], this Court is unpersuaded that tort actions will tend to disrupt the peace and harmony of the marriage . . . to any greater degree than would actions in ejectment, partition, or contract [all permitted under Indiana law].

Id.

[7]Chief Justice Arterburn, writing for the majority, stated:

> There has been a general apprehension that fraud and excessive litigation would result in unbearable cost to the public in the event municipal corporations were treated as ordinary persons for purposes of tort liability. On the other hand the unfairness to the innocent victim of a principle of complete tort immunity and the social desirability of spreading the loss—a trend now evident in many fields—have been often advanced as arguments in favor of extending the scope of liability. It is doubtful whether the purposes of tort law are well served by either the immunity rule or its exceptions.

Id. at 735-36, *quoting from* Brinkman v. City of Indianapolis, 141 Ind. App. 662, 666, 231 N.E.2d 169, 172 (1967).

[8]Roller v. Roller, 37 Wash. 242, 246, 79 P. 788, 789 (1905).

[9]Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948), *reviewed in* 26 Ind. L.J. 465 (1951); Gibson v. Gibson, 3 Cal. 3d 914, 916, 479 P.2d 648, 649, 92 Cal. Rptr. 288, 289 (1971); Dunlap v. Dunlap, 84 N.H. 352, 354, 150 A. 905, 906 (1930); Badigan v. Badigan, 9 N.Y.2d 472, 474, 174 N.E.2d 718, 720, 215 N.Y.S.2d 35, 36 (1961) (Fuld, J., dissenting), *cited with approval in*

They have noted the absence of any English case law on point and conclude that the doctrine is simply a product of ipse dixit in *Hewlett v. Ragsdale*,[11] the first American decision. To base a doctrine on nonexistent common law is hardly to be tolerated in our legal system, and cases based on such claims are justly criticized.[12] Yet, bald assertions that there was no such common law rule are equally unavailing, since the weight accorded such statements derives more from the reputation of the writers than from the scholarship on which they rest.

Not only was there no common law doctrine of parental immunity, but there is authority for the proposition that the common law recognized the capacity of minor children to sue their parents in tort. There is no doubt the common law permitted suits arising out of property[13] and contract[14] rights by minor chil-

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Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). *But cf.* Mroczynski v. McGrath, 34 Ill. 2d 451, 216 N.E.2d 137 (1966).

[10]H. CLARK, LAW OF DOMESTIC RELATIONS § 9.2, at 256-60 (1968); W. PROSSER, THE LAW OF TORTS § 122, at 864-68 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1072 (1930); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960).

[11]68 Miss. 703, *reported sub nom.* Hewelette v. George, 9 So. 885 (1891).

[12]Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Hastings v. Hastings, 33 N.J. 247, 163 A.2d 147 (1960); Small v. Morrison, 185 N.C. 577, 581, 118 S.E. 12, 17 (1923) (Clark, C.J., dissenting); W. PROSSER, THE LAW OF TORTS § 122, at 864-68 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1072 (1930). Student writers have overwhelmingly condemned the doctrine. *See, e.g.*, Note, Streenz v. Streenz: *The End of an Era of Parental Tort Immunity*, 13 ARIZ. L. REV. 720 (1971); Note, Gibson v. Gibson: *California Abrogates Parental Tort Immunity*, 7 CALIF. WESTERN L. REV. 466 (1971); Note, *Parental Immunity: The Case for Abrogation of Parental Immunity in Florida*, 25 U. FLA. L. REV. 794 (1973); Comment, *A Child's Rights Against His Parent: Evolution of the Parental Immunity Doctrine*, U. ILL. L. REV. 805 (1967); 25 ARK. L. REV. 368 (1971); 58 COLUM. L. REV. 576 (1958); 38 CORNELL L.Q. 462 (1953); 7 FORDHAM L. REV. 459 (1938); 64 HARV. L. REV. 1208 (1951); 26 TENN. L. REV. 561 (1959); 79 U. PA. L. REV. 80 (1930); 10 WASH. & LEE L. REV. 121 (1953). *Cf.* Cooperrider, *Child v. Parent in Tort: A Case for the Jury?*, 43 MINN. L. REV. 73 (1958).

[13]Roberts v. Roberts, Hardr. 96, 145 Eng. Rep. 399 (1657); Anon., Y.B. 2 Edw. 2 (1308), *reprinted in* 19 SELDEN SOC. 35 (1904). *See also* Duke of Beaufort v. Berty, 1 P. Wms. 703, 24 Eng. Rep. 579 (1721); Thomas v. Thomas, 2 Kay & J. 79, 69 Eng. Rep. 701 (1855). Indiana has consistently upheld this rule. *See, e.g.*, Young v. Wiley, 183 Ind. 449, 107 N.E. 278 (1914); Cotterell v. Koon, 151 Ind. 182, 51 N.E. 235 (1898); McKern v. Beck, 73 Ind. App. 92, 126 N.E. 641 (1920).

[14]Morgan v. Morgan, 1 Atk. 489, 26 Eng. Rep. 310 (1737). Indiana has allowed an emancipated child to recover wages due from minority from his father on the theory of implied contract. *See* Hilbish v. Hilbish, 71 Ind. 27 (1880). Recovery has also been permitted a child, minor or adult, for

dren against their parents. An English case decided over seven hundred years ago permitted a property suit by a child against his mother.[15] There was no hint that the suit was barred for any reason. An infant's capacity to sue and be sued was covered by early statutes. The earliest, dated 1275, states:

> [T]hat if any from henceforth purchase a Writ of Novel Disseisin, and he against whom the Writ was brought as principal disseisor, [dies] before the [assize] be passed, then the plaintiff shall have his Writ of [Entry] upon Disseisin against the heirs . . . of the disseisor . . . of what age so ever they be; (2) In the same wise the heirs . . . of the disseisee shall have their Writs of [Entry] against the disseisor . . . of what age soever they be . . . ; (3) so that for the nonage of the heirs of one party, nor the other, the Writ shall not be abated, nor the Plea delayed . . . .[16]

In 1285 a statute allowed infants to appear by next friend in all suits,[17] which commentators have noted was merely a confirmation of existing common law practices.[18] *Bassett's Case*[19] enunciated the developing policy of the common law by stating that "the common law rule is, that an infant in all things which [are] found to his benefit shall have favor and preferment in law . . . but shall not be prejudiced by anything to his disadvantage."[20] Modern legal writers confirm the preference shown infants in the common law,[21] though the general principle on which

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services rendered to the parent. *See* Miller v. Miller, 47 Ind. App. 239, 94 N.E. 243 (1911); Collins v. Williams, 21 Ind. App. 227, 52 N.E. 92 (1898); Story v. Story, 1 Ind. App. 284, 27 N.E. 573 (1891).

[15]Anon., Lib. Ass. 732, 3d (No. 763) and 5th (No. 838) (1203), *reprinted in* 3 SELDEN SOC. 83 (1966).

[16]3 Edw. 1, c. 47, 11 COKE'S INST. 265-68 (1275).

[17]13 Edw. 1, c. 15, 11 COKE'S INST. 390 (1285). The statute provides: "In every case whereas such as may be within age may sue, it is ordained; that if such within age be essoined, so that they cannot sue personally, their next friends shall be admitted to sue for them." Statutory law has always been construed as giving permission in all cases for infants to appear by next friend, the practice of the common law. *See* 2 J. REEVES, ENGLISH LAW § 180 (1880). This procedure is incorporated into Indiana law by IND. CODE § 34-2-3-1 (IND. ANN. STAT. § 2-209a, Burns Supp. 1974).

[18]2 J. REEVES, ENGLISH LAW § 180 (1880).

[19]2 Dyer 136a, 73 Eng. Rep. 297 (Ex. 1557). *See also* Beecher's Case, 8 Co. Rep. 58a, 77 Eng. Rep. 559 (Ex. 1608).

[20]2 Dyer 136a, 73 Eng. Rep. 297 (Ex. 1557).

[21]R. GRAVESON, STATUS IN THE COMMON LAW 20 (1953). He concludes that minor children "are the special favorites both of law and equity, and in any matter in which they are concerned their interests and welfare are predominent." *Id.*

the preference stands was best described by William Blackstone.[22] The preference continued in later English cases[23] and continues to this day.[24]

Ash v. Ash[25] appears to be the only case at common law wherein a child was permitted to sue a parent for a personal tort. In an action for assault, battery and false imprisonment, the daughter recovered 2000 pounds in damages from her mother who persuaded an apothecary to administer unneeded medicine and to confine the daughter for two or three hours, tied and bound. The attorney for Lady Ash, the mother, moved for and was granted a new trial based *only* on the excessiveness of the damages. There was no reference to any reason why suit was barred because of the parent-child relation. Surely if an immunity were known at common law it would have been raised on

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[22]3 W. BLACKSTONE, COMMENTARIES *2-3. He stated:

> The more effectively to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice.

Id.

[23]Whitfield v. Hales, 12 Ves., Jr. 492, 33 Eng. Rep. 186 (1806); Stevens v. Stevens, 6 Madd. 97, 56 Eng. Rep. 1028 (1821); Hall v. Hollander, 4 B. & C. 660, 107 Eng. Rep. 1206 (1825). It is stated in *Stevens* that it is "essential for the protection of infants that suits on their behalf should not be discouraged; and . . . an inquiry [into whether the suit is brought for the infant's benefit] ought never to be directed unless there be a strong case of no benefit or improper motive." 6 Madd. at 97, 56 Eng. Rep. at 1028. The *Thomas* case goes farther, albeit in dicta, by suggesting that the statute of limitations would not run against minor children until they reach majority as to property claims against their father, whereas it might run as to property claims against strangers. Thomas v. Thomas, 2 Kay & J. 79, 69 Eng. Rep. 701 (1855).

[24]*See, e.g.*, McKee v. McKee, [1951] A.C. 352 (P.C.). Cases from other Commonwealth countries not only recognize the preference to be accorded children but specifically allow children to sue their parents for personal torts. Dolbel v. Dolbel, [1963] N.S. Wales 758 (1962) (Australia); Deziel v. Deziel, [1953] 1 D.L.R. 651 (Ont. H. Ct. 1952) (Canada); Fidelity & Cas. Co. v. Marchand, [1923] 4 D.L.R. 913 (1923), *rev'd on other grounds*, 4 D.L.R. 157 (1924) (Canada); Young v. Rankin, [1934] Sess. Cas. 499 (Scot. 1st Div.). Their approach is illustrated by *Fidelity:*

> It seems therefore sufficient to say [the law does not distinguish between minor children and others who sue the parent], however repugnant it may seem that a minor child should sue his own father, although it would probably be equally repugnant that a child injured by his father's negligent act, perhaps maimed for life, should have no redress for the damages he has suffered.

4 D.L.R. at 166 (Mignault, J., concurring).

[25]Comb. 357, 90 Eng. Rep. 526 (1696).

this appeal, given the huge sum the recovery represented in 1696. Considering the policy iterated in *Bassett's Case*,[26] the court may very well have thought the age and status of the plaintiff-daughter of so little consequence as not to be worthy of mention.

Modern Commonwealth cases are uniform in their opinion that no immunity rule existed at common law.[27] Some have intimated that even if such a doctrine did exist at common law it could not be rationally sustained today.[28]

B. Early American Decisions

Prior to *Hewlett v. Ragsdale*[29] in 1891, three cases suggested that those standing in loco parentis were not thereby immune from suits arising out of torts committed against minors. *Gould v. Christianson*[30] held a minor child entitled to recover damages from a shipmaster, into whose care the youth had been placed by his father, for assault and battery. The standard of conduct applied to the shipmaster required that he exercise the restraint of a parent in chastising minors committed to his care and that such conduct must clearly be in furtherance of constructive discipline, not wanton personal violence. *Lander v. Seaver*[31] involved a suit for trespass by a minor child against his schoolmaster. The court held that the teacher was not liable for corporeal punishment unless it was clearly excessive. *Nelson v. Johansen*[32] allowed a minor to sue her guardian for negligently failing to properly clothe her, resulting in a severe illness to the child. These cases are illustrative of basic common law policy. The interests of

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[26] 2 Dyer 136, 73 Eng. Rep. 297 (1557).

[27] *See, e.g.*, Fitzgerald v. Northcote, 4 F. & F. 656, 176 Eng. Rep. 734 (1865) (schoolmaster in loco parentis held liable); Young v. Rankin, [1934] Sess. Cas. 499 (Scot. 1st Div.) (natural parents held liable). It is stated in *Young:*

> Is there any clearly settled rule or principle of the common law or the public policy to prevent a son in minority, who has been injured through the fault of his father, from maintaining an action to be compensated for his injuries? I can find no such rule or principle, and we were referred to no judicial formulation of it, if such a rule exists.

Id. at 508. *See also* Dolbel v. Dolbel, [1963] N.S. Wales 758 (1962) (Australia); Fidelity & Cas. Co. v. Marchand, [1923] 4 D.L.R. 913 (1923), *rev'd on other grounds*, 4 D.L.R. 157 (1924) (Canada).

[28] Young v. Rankin, [1934] Sess. Cas. 499, 520 (Scot. 1st Div.).

[29] 68 Miss. 703, *reported sub nom.* Hewelette v. George, 9 So. 885 (1891).

[30] 10 F. Cas. 857 (No. 5,636) (D.C.S.D. N.Y. 1836).

[31] 32 Vt. 114 (1859).

[32] 18 Neb. 180, 24 N.W. 730 (1885). Later cases upheld the liability of those in loco parentis. Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925).

minors are to be protected by courts as against those into whose care they have been entrusted by their parents, without regard to the nature or degree of control exercised.

C. *Rise of the Doctrine*

Hewlett v. Ragsdale[33] was the first case to squarely recognize the parental immunity doctrine. A mother maliciously committed her daughter to an insane asylum. The Mississippi Supreme Court refused to allow the daughter to recover in damages, citing the desire to preserve domestic harmony.[34] In 1903, *McKelvey v. McKelvey*[35] held that a minor child could not sue her stepmother or father for damages resulting from brutal punishment inflicted by the stepmother with the father's consent. In 1905, the doctrine was carried to an absurd extreme in *Roller v. Roller*,[36] a suit by a daughter against her father for damages arising out of a rape. He had already been convicted and sent to prison. The Washington Supreme Court held that the raped daughter could not sue, for to allow suit would fly against the interest that society has in preserving harmony in domestic relations, an interest "inspired by the universally recognized fact that the maintenance of . . . proper family relations is conducive to good citizenship, and therefore works to the welfare of the state."[37] The court relied on three additional public policy arguments: (1) the possibility that, were the prevailing minor to die before majority, the wrongdoing parent would succeed to the sum recovered, (2) the depletion of family financial resources, and (3) an analogy between parent-child suits and the interspousal immunity doctrine.[38] For thirty years after *Hewlett, McKelvey* and *Roller,* courts recognizing the doctrine outnumbered those disapproving it[39] despite

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[33]68 Miss. 703, *reported sub nom.* Hewelette v. George, 9 So. 885 (1891).

[34]*Id.* at 711, 9 So. at 887.

[35]111 Tenn. 388, 77 S.W. 664 (1903).

[36]37 Wash. 242, 79 P. 788 (1905).

[37]*Id.* at 244, 79 P. at 788.

[38]*Id.* at 245, 79 P. at 789.

[39]Only one case held that an unemancipated child could sue his parent for a personal tort. Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930). The remainder denied the child's right to sue. *See, e.g.,* Owens v. Automobile Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931); Mesite v. Kirchstein, 109 Conn. 77, 145 A. 753 (1929); Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Lund v. Olson, 183 Minn. 515, 237 N.W. 188 (1931); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939); Stacey v. Fidelity & Cas. Co., 114 Ohio St. 633, 151 N.E. 718 (1926); Krohngold v. Krohngold, 181 N.E. 910 (Ohio Ct. App. 1932); Canen v.

the persistent efforts of dissenting judges[40] and legal scholars.[41] Today, more courts retain the doctrine than reject it.[42]

Additional reasons have been developed in the approving cases in a seemingly vainglorious attempt to shore up the defective origins of the rule while avoiding results similar to the incredible *Roller* case.[43] These reasons have been (1) the position of the family as a quasi-governing unit and the analogy of parental discipline to judicial powers, (2) the danger of fraudulent, collusive or trivial claims, (3) the interference with parental discretion and control, and (4) the prevention of stale claims by adult children alleging torts committed during their minority.

II. Public Policies Supporting Immunity

Possibly the oldest of reasons advancing the parental immunity doctrine is the notion that a family is a quasi-governmental unit. At Roman law, a father had absolute power over the very lives of his children, though such power was tempered by the maxim, "[p]atria potestas in pietate debet, non in atrocitate, consistere."[44] The common law moved away from the Roman concept towards the concept that children are too protected by the law, even from their parents. In the spirit of the common law movement from status to contract, *Lander v. Seaver*[45] noted

Kraft, 41 Ohio App. 120, 180 N.E. 277 (1931); York Trust Co. v. Blum, 22 Pa. D. & C. 313 (1935); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

[40]Small v. Morrison, 185 N.C. 577, 582, 118 S.E. 12, 17 (1923) (Clark, C.J., dissenting).

[41]McCurdy, *Torts Between Persons in Domestic Relations*, 43 Harv. L. Rev. 1030, 1056 (1930).

[42]Since 1963, fifteen states have rejected the immunity doctrine using various formulations. Xaphes v. Mossey, 224 F. Supp. 578 (D. Vt. 1963); Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Petersen v. Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1969); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. Ct. App. 1971); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972) (dicta—abrogation not necessary to result); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971) (limited to automobile accidents); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). The doctrine is either recognized in all other states, or it has never arisen in a reported case.

[43]37 Wash. 242, 79 P. 788 (1905).

[44]Paternal power should consist [or be exercised] in affection, not in atrocity. Black's Law Dictionary 1283 (4th rev. ed. 1968).

[45]32 Vt. 114 (1859).

the difference between the ancient and modern views in a discussion of a schoolmaster in loco parentis.

> We think the schoolmaster does not belong to the class of public officers vested with . . . judicial . . . powers. He is included rather in the domestic relation of master and servant . . . . In some sense he may be said to act by public authority, but we do not find him spoken of anywhere as acting in a judicial capacity . . . .[46]

If those standing in loco parentis are not clothed with judicial powers in matters of discipline, then natural parents can hardly be said to have such power, especially in view of the close parallels between those in loco parentis and parents. Absent some method whereby parents are granted judicial powers, the family cannot be considered a quasi-governing unit. It is significant to note that this argument has been advanced only once, in *Matarese v. Matarese*,[47] and has not been heard from again.

The second reason advanced in support of the doctrine draws an analogy between interspousal immunity and parental immunity. *McKelvey v. McKelvey*[48] first sought out the analogy by comparing a husband's duty to protect and maintain his wife[49] with a father's duty to protect and maintain his children.[50] The interspousal immunity doctrine was founded, however, upon the common law identity of husband and wife as a single legal entity. No such merger has ever been the basis of parent-child relations. Moreover, most states have enacted married women's statutes which militate against an absolute merger of identity and the concomitant incapacity to act independently of the husband.[51] Finally, the interspousal immunity doctrine is under attack and has been abrogated in many states, including Indiana.[52] The analogy is, therefore, based upon the slimmest of superficialities and is fundamentally unsound.

The danger of fraudulent, collusive or trivial claims is the third reason put forth in defense of the doctrine. The rationale is best stated in *Hastings v. Hastings*,[53] which reasoned that the

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[46]*Id.* at 121.

[47]47 R.I. 131, 131 A. 198 (1925). Another case mentioned the family *qua* government argument but professed no faith in it. Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942).

[48]111 Tenn. 388, 77 S.W. 664 (1903).

[49]*Id.* at 391, 77 S.W. at 665.

[50]*Id.* This duty has been long recognized in the law, violation of which can give rise to criminal prosecution. *See* Eaglen v. State, 249 Ind. 144, 231 N.E.2d 147 (1967).

[51]H. CLARK, LAW OF DOMESTIC RELATIONS § 7.2, at 222 & n.4 (1968).

[52]Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972).

[53]33 N.J. 247, 163 A.2d 147 (1960).

decision for the child to sue will be determined within the family circle, with the defendant-parent's participation, thus making the risk of collusion very great indeed. There are at least six reasons, however, why this rationale is unsound. Trial courts have at their command effective means to detect and expose fraud and collusion. Cross-examination, pretrial discovery and arguments before the jury are available to any party of interest who feels fraud exists.[54] Insurance carriers are likewise protected by the typical condition in a policy requiring cooperation between the insurer and the insured parent.[55] Lawyers are not apt "to encourage litigation which has no merit, particularly where the customary fee arrangement is a contingent one."[56] The relation of parent and child goes only to the credibility of the parties, not to the nature of the action itself. To bar suits on the basis of prospective fraud and collusion is tantamount to a presumption of fraud which cuts across an entire class of cases,[57] despite the absence of such a presumption in parent-child suits involving property or contracts. Finally, the existence of fraud or collusion is predicated upon an assumed cooperation between parent and child. Aside from the fact that there may be precious little cooperation, this rationale contradicts another reason for the immunity doctrine—the disruption of family unity. Despite the incompatibility of these separate rationales, they continue to be used together.[58]

A fourth basis which has been recognized for the doctrine is that successful suits of this kind will deplete the family finances; one child's recovery is another child's loss. It is contended that the public policy should encourage the equal application of family resources for the benefit of all.[59] Critics have focused upon the fact that no child has a "legally recognized claim to . . . the parent's property or even to equality of treatment."[60] There is no assurance that granting or denying the right of recovery will

[54]*See generally* 32 ATL. L.J. 277, 281 (1968).

[55]*Id.*

[56]Balts v. Balts, 273 Minn. 419, 430, 142 N.W.2d 66, 73 (1966).

[57]*Cf.* Midkiff v. Midkiff, 201 Va. 829, 833, 113 S.E.2d 875, 878 (1960).

[58]*See* Barlow v. Iblings, 261 Iowa 713, 156 N.W.2d 105 (1968).

[59]Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). *See also* Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

[60]McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1073 (1930), *citing* Rice v. Andrews, 127 Misc. 826, 217 N.Y.S. 528 (Sup. Ct. 1926). *See also* Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952). Chief Judge Peaslee, in Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930), rejected the "family exchequer" argument by reasoning that this argument "ignores the parent's power to distribute his favors as he will, and leaves out of the picture the depletion of the child's assets of health and strength through the injury." *Id.* at 361, 150 A. at 909.

in any way affect the manner in which family resources are allocated for the benefit of other children. At most this desire to protect the family exchequer is relevant to the potential of even-handed allocation of resources, a potential whose realization is entirely speculative.

Four other criticisms of the family finances rationale are noted here. When the recovering child is the only family member other than the paying parent, or when the child recovers jointly with all family members from the parent responsible for the tort, the application of the doctrine is specious. When the parent's liability will be covered by an insurance policy, there is no change in total family resources save the premiums, an obligation not affected by the suit. The protection of family resources has little to do with a parent's liability toward third persons for torts. Courts have never recognized this rationale in cases involving children recovering from parents in matters not sounding in tort.

The fifth reason for the doctrine is the possibility that the parent will succeed to the child's estate, if the child dies during minority, including the judgment the child received from the parent by reason of the tort. The underlying principle is that no one should be allowed to profit from his own wrongs.[61] If inheritance by the parents is to be discouraged, there is no reason why such a policy should not be evenly applied. Husbands should not be allowed to recover from their wives if, upon the husband's death, the wife can collect at least her forced heir share. Parents should not be allowed to sue adult children who have no prospective heirs save the parents. Obviously this rationale is not so applied. This raises the question of whether courts are actually committed to this reason or whether the reason is merely used as fatuous bolstering of an otherwise shaky doctrine.

Other criticisms can be based upon circumstances where the child's recovery does not, at death during minority, pass to the defendant-parent. The common themes of these criticisms would be that there are many situations in which a parent could not inherit sums recovered by the child as a matter of law, and the possibility of succession can be circumvented in many ways, and is in any case so remote, that the reasons for abrogating the doctrine outweigh this rationale as a matter of public policy.

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[61] *See* Hartfield v. Roper & Newell, 21 Wend. 615, 620, 13 N.Y. Com. L. Rep. 1209, 1211 (Sup. Ct. 1839). It is interesting to note that this precept can be used on both sides of the immunity issue. The sums for which the parent might otherwise be liable, but for the immunity, could be considered his profit for the wrong. Denying the child's right to bring suit amounts to a judicial sanction of that profit.

Still another reason given for the doctrine is the prevention of stale claims by minors upon reaching majority.[62] Courts would have difficulty separating fanciful from real claims. To the extent that stale claims are disapproved due to the possibility of fraud, the criticisms are the same as those for the fraud rationale. To the extent they are disapproved because of difficulty or failure of proof, owing to the passage of time, there are several criticisms. First, problems of proof in tort actions should at least be ascertained on a case-by-case basis, not presumed for the entire class. Secondly, courts are quite capable of rendering judgments based on acts occurring many years prior to trial, as in suits based on adverse possession or multi-year contracts. Thirdly, suits by adult children against their parents based on acts committed during minority are permitted when concerned with property or contracts. Most states recognize this by enacting statutes which toll the statute of limitations for minors until they reach majority. If the legislatures could not face delayed suits, they would not have passed such laws.[63]

By far the most frequently cited rationale for the doctrine is that to allow children to sue their parents would disturb domestic tranquility.[64] Courts have not confined themselves to a single expression of this rationale. Some have emphasized the effect adversary proceedings have on family unity[65] while others note the disruption wrought by the mechanics of suit.[66] Commentators and judges have criticized this rationale on many levels. One noted scholar points out the absence of such a rationale in suits involving property or contracts.[67] Others have mentioned the inconsistency of this argument with the fraud rationale. When parents are indemnified against loss by an insurance policy, whatever disruption may occur would be minimal and wholly tolerable under public policy. The facts of the case may indicate that no family unity ever existed, or that it has been destroyed by the tort, as in *Roller v. Roller*.[68] Perhaps the most irrefutable attack on this argument would be that the redress of a child's just claim should contribute far more to immediate and continued family peace than would a doctrine which summarily deprives the child of a remedy for what is admittedly a wrong.

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[62]Small v. Morrison, 185 N.C. 577, 580, 118 S.E. 12, 14 (1923), *citing* J. SCHOULER, DOMESTIC RELATIONS § 691 (6th ed. 1921).

[63]*See, e.g.*, IND. CODE § 34-1-2-5 (Burns 1973).

[64]*See, e.g.*, cases cited note 39 *supra*.

[65]Mesite v. Kirchstein, 109 Conn. 77, 84, 145 A. 753, 755 (1929).

[66]Luster v. Luster, 299 Mass. 480, 482, 13 N.E.2d 438, 439 (1938).

[67]McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1075 (1930).

[68]37 Wash. 242, 79 P. 788 (1905).

Whatever force the family unity argument has is left at the doorstep of particular circumstances and common sense. It is absurd to suppose that in all cases family unity will be lost. Recovery under wrongful death statutes, conviction of the parent for a crime against the minor child, and indemnification by insurance unassailably militate against the blanket application of the domestic harmony rationale. Even limiting its use to individual cases, however, does not go far enough. It is common knowledge that "some of the most acrimonious family disputes have arisen in respect to property."[69] To allow the greater disruption of some actions while denying tort suits, arguably resulting in less disruption, cannot be tolerated by the judicial conscience. One writer has gone so far as to say that "[t]his paradox of permitting suits affecting property and contracts, but denying actions for personal torts must be acceptable only to those with a large tolerance for whimsy and a spacious indifference to justice."[70]

The final reason advanced in support of the doctrine is that to permit suit will interfere with parental discipline, authority and control. In *Small v. Morrison,*[71] it is stated that "[n]o greater disservice could be rendered to any child than to teach its feet to stray from the path of rectitude, or to suffer its mind to be poisoned by ideas of disloyalty and dishonor."[72] The law has always recognized that not all parental conduct is subject to judicial review.[73] The parent's right to administer reasonable chastisement has been consistently protected even though such conduct might otherwise have constituted a technical assault.[74] As noted in *Cowgill v. Boock,*[75] "parental non-liability is not granted as a reward, but as a means of enabling the parents to discharge the duties which society exacts."[76]

The court in *Borst v. Borst*[77] noted the limits of this argument by recognizing that when the tort has nothing to do with

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[69]McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030, 1075 (1930).

[70]30 NACCA L.J. 133, 137-38 (1964).

[71]185 N.C. 577, 118 S.E. 12 (1923).

[72]*Id.* at 581, 118 S.E. at 15.

[73]*See, e.g.,* Manners v. State, 210 Ind. 648, 5 N.E.2d 300 (1936). *See generally* W. PROSSER, THE LAW OF TORTS § 27, at 136 (4th ed. 1971).

[74]*Cf.* Hornbeck v. State, 16 Ind. App. 484, 45 N.E. 620 (1896).

[75]189 Ore. 282, 218 P.2d 445 (1950) (Rossman, J., specially concurring).

[76]*Id.* at 307, 218 P.2d at 455.

[77]41 Wash. 2d 642, 251 P.2d 149 (1952). Chief Judge Peaslee, in Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930), would have gone further. He stated, with perhaps more emotion than logic, "[i]t smacks of the abandoned notion that ignorance and blind obedience of the servient class is necessary to their proper control." *Id.* at 361, 150 A. at 910.

an exercise of parental authority the rationale is meaningless. When the tort is related to parental authority, it should not be protected if it involves excesses of parental discipline ranging from the merely unreasonable to the cruel and inhuman. Some courts have interpreted this criticism as tacit support for a "parental authority" exception to the immunity doctrine.[78] This is the essence of *Goller v. White*[79] which held that the immunity should be preserved in two areas: when the negligent act involves an exercise of parental authority, and when the negligent act involves an exercise of parental discretion with regard to providing food, clothing, or other essentials for the child. Justice Sullivan, in *Gibson v. Gibson*,[80] rejected the *Goller* approach as simply replacing a broad immunity with a narrow one still subject to basic infirmities. He noted:

> [A]lthough a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits . . . . [W]e think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?[81]

Courts have not been insensitive to the criticisms leveled at the doctrine. Numerous exceptions have sprung up—so many that some writers feel the rule has been judicially gutted.[82] There are at least seven major exceptions to an absolute immunity rule: (1) when the personal injuries are intentionally, wilfully or wantonly inflicted on the child,[83] (2) when the conduct consists of

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[78]Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. Ct. App. 1971); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963). Many recent cases have impliedly rejected the interpretation of these cases by holding that a minor child cannot sue his parents for negligence. Denault v. Denault, 220 So. 2d 27 (Fla. Ct. App. 1969); Rickard v. Rickard, 203 So. 2d 7 (Fla. Ct. App. 1967); Sanford v. Sanford, 15 Md. App. 390, 290 A.2d 812 (1972); Downs v. Poulin, 216 A.2d 29 (Me. 1966); Hale v. Hale, 426 P.2d 681 (Okla. 1967); Castellucci v. Castellucci, 96 R.I. 34, 188 A.2d 467 (1967); Littleton v. Jordan, 428 S.W.2d 472 (Tex. Ct. App. 1968).

[79]20 Wis. 2d 402, 122 N.W.2d 193 (1963).

[80]3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

[81]*Id.* at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

[82]*See* 32 ATL. L.J. 277, 278-82 (1968).

[83]Dennis v. Walker, 284 F. Supp. 413 (D.D.C. 1968); Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939); Begley v. Kohl & Madden Printing Ink Co., 157 Conn. 445, 254 A.2d 907 (1969) (dicta); Buttrum v. Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1958); Aurora Nat'l Bank v. Anderson, 132 Ill. App. 2d 217, 268 N.E.2d 552 (1971); Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959); Chaffin v. Chaffin, 239 Ore. 374, 397 P.2d 771 (1964); Felderhoff v. Felderhoff, 473

varying degrees of negligence,[84] (3) when either the parent or child dies and suit is brought under various representation statutes,[85] (4) when the child is injured as a result of a business, rather than a personal, activity of the parent,[86] (5) when the parent's tortious acts are imputed to his employer who is sued by the child,[87] (6) when there is a de facto or de jure emancipation of the child,[88] and (7) when the child brings suit as the representative of a deceased parent against another parent or his estate.[89]

A sizable number of courts have declined to follow the lead of states carving out exceptions to the doctrine; they have explicitly abrogated the doctrine in whole or in part. Since 1963, fifteen states have chosen this path.[90] Yet, even those states which have abrogated the doctrine have done so only because they could not rationally support any of the eight reasons for the doctrine discussed above. Little attention has been paid to the development of reasons that the abrogation of the doctrine is per se desirable.

S.W.2d 928 (Tex. 1971) (dicta); DeLay v. DeLay, 54 Wash. 2d 63, 337 P.2d 1057 (1959) (dicta). *But see* Owens v. Automobile Mut. Indem. Co., 235 Ala. 9, 177 So. 133 (1937); Chastain v. Chastain, 50 Ga. App. 241, 177 S.E. 828 (1934); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Rowe v. Rugg, 117 Iowa 606, 91 N.W. 903 (1902); Cook v. Cook, 232 Mo. App. 994, 124 S.W.2d 675 (1939); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966); Maxey v. Sauls, 242 S.C. 247, 130 S.E.2d 570 (1963).

[84]Buttrum v. Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1958) (dicta); Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950); Hoffman v. Tracy, 67 Wash. 2d 31, 406 P.2d 323 (1965). *But cf.* Stevens v. Murphy, 69 Wash. 2d 939, 421 P.2d 668 (1966).

[85]*Compare* Harlan Nat'l Bank v. Gross, 346 S.W.2d 482 (Ky. Ct. App. 1961), *with* Fowler v. Fowler, 242 S.C. 252, 130 S.E.2d 568 (1963), *and* Hale v. Hale, 312 Ky. 867, 230 S.W.2d 610 (1950).

[86]Trevarton v. Trevarton, 151 Colo. 418, 378 P.2d 640 (1963); Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930); Signs v. Signs, 156 Ohio St. 566, 103 N.E.2d 743 (1952); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

[87]Mi-Lady Cleaners v. McDaniel, 235 Ala. 469, 179 So. 908 (1938); Chase v. New Haven Waste Material Corp., 111 Conn. 377, 150 A. 107 (1930). *But cf.* Foy v. Foy Elec. Co., 231 N.C. 161, 56 S.E.2d 418 (1949); Sherby v. Weather Bros. Transfer Co., 421 F.2d 1243 (4th Cir. 1970) (applying Maryland law); Meece v. Holland Furnace Co., 269 Ill. App. 164 (1933); Smith v. Henson, 214 Tenn. 541, 381 S.W.2d 892 (1964).

[88]Shea v. Pettee, 19 Conn. Supp. 125, 110 A.2d 492 (1954); Skillin v. Skillin, 130 Me. 223, 154 A. 570 (1931).

[89]Johnson v. Ottomeier, 45 Wash. 2d 419, 275 P.2d 723 (1954). *Cf.* Union Bank & Trust Co. v. First Nat'l Bank, 362 F.2d 311 (5th Cir. 1966) (applying Georgia law). *See also* Brennecke v. Kilpatrick, 336 S.W.2d 68 (Mo. 1960).

[90]*See* cases cited note 42 *supra.*

There are numerous expressions of affirmative public policy which can be utilized by counsel and courts in examining the doctrine.

III. Public Policies Supporting Abrogation

It is not enough for courts to take note of the familiar maxim that when the reasons for the rule cease, so should the rule. There should be a parallel maxim that when the reasons against the rule are paramount, the rule should cease. There are nine reasons which oppose the effect of the parental immunity doctrine and, taken together, are indeed paramount. They are (1) the policy of the common law, (2) the absence of legislative barriers to abrogation, (3) the idea that no one should be allowed to benefit from his own wrong, (4) the spirit of our legal system, (5) the letter and spirit of the Indiana Constitution, (6) the inadequacy of other remedies, (7) the effect of liability insurance on the doctrine, (8) the prevalence of child abuse and society's interest in its elimination, and (9) the public policy favoring children.

As noted above, the conclusions of early American courts, that the doctrine was the product of the common law, were in error. Writers have generally conceded that there was no common law rule one way or the other. In view of some early cases and statutes which reveal an intent to protect minors, however, it does no violence to common law to conclude that, if any rule existed, its policy was to permit children to sue their parents and to remove obstacles to such suits. Since Indiana has adopted the common law and the legislature has not spoken to the doctrine, the conclusion is possible that *Smith v. Smith*[91] was in error and contrary to common law.[92]

Assuming that there was no time-honored rule, the doctrine is traceable to *Hewlett v. Ragsdale*[93] and is common law of recent vintage. The notion that a judicially created rule of common law can be judicially destroyed was most recently reiterated in *Brooks v. Robinson.*[94] Justice Hunter spoke to this concept by saying that "this Court should not hesitate to alter, amend, or abrogate the common law when society's needs so dictate."[95]

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[91]81 Ind. App. 566, 142 N.E. 128 (1924).

[92]The effect of concluding that if such a common law rule existed it permitted suit by minors is important to future Indiana decisions. The common law is in effect in this state except where modified or abrogated by statute, Phillips v. Tribbey, 82 Ind. App. 68, 141 N.E. 262 (1923), or by judicial decree, as in Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972) and Campbell v. State, 284 N.E.2d 733 (Ind. 1972).

[93]68 Miss. 703, *reported sub nom.* Hewelette v. George, 9 So. 885 (1891).

[94]284 N.E.2d 794 (Ind. 1972).

[95]*Id.* at 797.

Abrogation of the doctrine is consistent with the letter and spirit of the Indiana Constitution, which states: "All courts shall be open; and every man, for injury done to him . . . shall have remedy by due course of law."[96] This spirit has pervaded our legal system from the earliest times. Magna Carta contains similar language: "To no one will we sell, to no one will we refuse or delay, right or justice."[97] Since denying a minor child the right of recovery against his parents for torts which would be actionable, were they strangers, amounts to a denial of substantive justice to the child and permits the parent to benefit from his own wrong, courts upholding the doctrine are impliedly ignoring a precept of our law which has been constantly reaffirmed over the last seven hundred years.

Consistent with this spirit is the idea that one should not only have a remedy for a wrong done to him, but also that the remedy should be adequate. Some courts have brazenly intimated that criminal processes against the parent are sufficient remedy for the child.[98] *Treschman v. Treschman*[99] rightly challenged this supposition by stating that it is manifestly unfair to say that criminal prosecution is sufficient to correct parental abuses. Although such protection is prospective, "the criminal sanctions which the State has imposed leaves [*sic*] the clear and palpable injustice to the individual child still unredressed."[100] The only remedy for the child which would resolve this "palpable injustice" is the right to maintain the tort action against the parent. It is therefore a matter of affirmative public policy that minor children be allowed to recover when the merits so warrant.

It cannot be disputed that the essence of law is reality. When law and fact collide, the law should give way. The prevalence of liability insurance is just such a reality. Its existence undercuts the vitality of the doctrine by removing its prime justifications. There would be no disruption of domestic harmony, no diminution of family finances, less chance that fraud or collusion will go undetected, and less likelihood that parental authority will be undermined. There are, moreover, affirmative features to insurance. Its aim is the transference of a risk from specified types of losses.[101] When loss is not covered by insurance, both the in-

[96]IND. CONST. art. 1, § 12.

[97]MAGNA CARTA § 40 (1215).

[98]*See, e.g.*, Smith v. Smith, 81 Ind. App. 566, 572, 142 N.E. 128, 132 (1924). Another court suggested that the natural affections of the family are a sufficient remedy for the injured child. Brown v. Cole, 198 Ark. 417, 129 S.W.2d 245 (1939).

[99]28 Ind. App. 206, 61 N.E. 961 (1901).

[100]*Id.* at 208, 61 N.E. at 962.

[101]G. COUCH, COUCH ON INSURANCE § 2, at 3 (1929).

jured and the liable parties may become so destitute as to become burdens on the public charge. Avoiding the extreme effects of uninsured loss is a major goal of state promotion of insurance by its laws.

Recognizing the beneficial effect liability insurance has on the public welfare, courts have no reason to cast a jaundiced eye on the child. They should rather continue the policy of promoting insurance by allowing minor children to sue their parents for personal torts. Parents would be encouraged to purchase liability insurance to cover their children and insurance companies would be prompted to provide the coverage. Courts would be advancing the public policy of protecting children from personal loss.

Another reality the law cannot ignore is the increase of child abuse in our society.[102] It is surely a matter of public policy to reduce the incidence of child abuse, to protect the helpless child, and to castigate erring parents. But the public policy goes further. Generally speaking, people who engage in violence tend to have been the victims of violence when they were children.[103] If a person who has been abused in childhood becomes a parent, the likelihood of a repetition of abusive practices is great.[104] Thus, the rewards of a public policy which unmistakably discourages child abuse are to be found not only in the health and well-being of today's children, but also in the welfare of future generations. If approval of the immunity doctrine can logically be used to protect parents who abuse their children, as was demonstrated in *McKelvey v. McKelvey*[105] and *Roller v. Roller*,[106] then the abrogation of the doctrine must be considered another tool in furtherance of an affirmative public policy of eliminating child abuse altogether.

The most potent public policy affirmatively supporting abrogation is the interest society has in keeping a child's physical and mental well-being, and consequent earning power, unimpaired throughout life.[107] When the child is injured by the parent, how

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[102]D. BAKEN, SLAUGHTER OF THE INNOCENTS 4-5 (1971).

[103]Duncan, Frazier, Litin, Johnson & Barron, *Etiological Factors in First-Degree Murder*, 168 J.A.M.A. 1755, 1755-58 (1958).

[104]D. BAKEN, SLAUGHTER OF THE INNOCENTS 114 (1971). *See also* Nurse, *Familial Patterns of Parents Who Abuse Their Children*, 35 SMITH COLLEGE STUDIES IN SOCIAL WORK 11-25 (1964); Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293 (1972).

[105]111 Tenn. 388, 77 S.W. 664 (1903).

[106]37 Wash. 242, 79 P. 788 (1905).

[107]McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1073 (1930); McCurdy, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960).

else can society guarantee recompense to the child save by permitting suit on the tort? Our commitment to children would be meager indeed if we rely exclusively on the largesse of the negligent or violent parent to provide for the child, a matter almost wholly within parental discretion. The judicial system provides the most efficient structure whereby society's interests in the future of children can be given the full expression it deserves. And, the judicial system can be used only if the doctrine is abrogated.

IV. Conclusions

When Indiana courts are again faced with the parental immunity doctrine, as they will be,[108] given the encouragement of *Brooks v. Robinson*[109] and *Campbell v. State*[110] and the results of cases like *Hollowell v. Greenfield*,[111] judges will find the area has changed much since they last considered the question in 1924.[112] They will find a variety of reasons upon which the doctrine has been upheld here and elsewhere, dozens of reasons used by other judges and writers to mercilessly attack those reasons, a number of exceptions to the doctrine, and numerous reasons why there should be no doctrine at all. There is little question that the immunity cannot stand—the only question remaining will be how much of the rule must fall. The options are varied: (1) courts can distinguish between negligent and intentional, wilful or wanton torts, (2) courts can partially abrogate the doctrine, (3) courts can hold the parent's conduct against a standard of reasonable-

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[108]On September 18, 1974, the Indiana Court of Appeals ruled, in Vaughan v. Vaughan, 316 N.E.2d 455 (Ind. Ct. App. 1974), that Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924), retains its judicial vitality. A young boy was injured by a falling tombstone while visiting a cemetery with his parents. The child sued his parents, by his grandfather, for negligent supervision. The trial court sustained a motion to dismiss, citing the immunity doctrine. The overruled motion to correct errors, on appeal, attacked the doctrine.

While the court conceded that Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972), tends to militate against the fraud, collusion, and trivial litigation rationale of the doctrine, this and other cases cited therein were not held to be support for the proposition that the remaining rationales are defective, in the manner herein noted. On transfer, the doctrine should be placed squarely before the Indiana Supreme Court.

[109]284 N.E.2d 794 (Ind. 1972).

[110]284 N.E.2d 733 (Ind. 1972).

[111]142 Ind. App. 344, 216 N.E.2d 537 (1966). Indiana tacitly recognized one of the exceptions to the immunity doctrine by allowing a minor child to sue his father's employer for his father's negligence.

[112]Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924).

ness when related to an exercise of parental authority, or (4) courts can abrogate the doctrine in its entirety.

The only logical choices are the latter two. Only these are compatible with affirmative public policy as it concerns the relations of parent and child in our society. Of the two, the former is superior—the approach taken by *Gibson v. Gibson.*[113] Total abrogation inevitably would result in treating parents and children as if they were strangers; it fails to recognize that certain rights and responsibilities accrue to the parent-child relation. The standard of reasonableness announced in *Gibson* balances the rights of a child in seeking a remedy with the rights of a parent in maintaining basic authority over the child. In this way, society's interest in maintaining the legal identity of the family unit can be preserved while still allowing minor children to sue their parents for personal torts.

BRIAN J. FAHEY

[113] 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

The Constitutional Guarantee of Speedy Trial

I. Introduction

The Speedy Trial Act of 1974[1] was signed into law by President Ford on January 3, 1975. The Act provides that commencing July 1, 1979, an indictment or information must be filed within thirty days after arrest; an arraignment must be held within ten days after the filing of an indictment or information; and the defendant must be tried within sixty days after he pleads not guilty at his arraignment.[2] If the time limits are exceeded the charges are to be dismissed. Discretion is vested with the court to dismiss with or without prejudice after considering the seriousness of the offense, the circumstances leading to dismissal, and the effect of reprosecution on the administration of the Act and on the administration of justice.[3]

The full impact of the Speedy Trial Act of 1974 cannot yet be measured. Its effect on the entire federal criminal justice system will undoubtedly be profound, far reaching, and perhaps, in some instances, even traumatic. The Act does not, however, displace the constitutional right of speedy trial. The Act excludes many periods of delay from its coverage. Even when the time limits of the Act are exceeded, a defendant may involuntarily waive the violation by failure to move for dismissal prior to trial or entry of a guilty plea,[4] or the charges against a defendant may be dismissed without prejudice, thus allowing reprosecution for the same offense. The Act itself recognizes that "[n]o provision . . . shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution."[5] Nevertheless,

[1] 18 U.S.C. § 3161 *et seq.* (120 Cong. Rec. S22,483 (daily ed. Dec. 20, 1974)).

[2] *Id.* § 3161. Gradually decreasing time limits are provided during the interim period until July 1, 1979. Certain periods of delay are excluded from the computation of the time limitations, such as delay resulting from (1) proceedings concerning the defendant, including hearings on pretrial motions, (2) written agreement with the defendant, (3) the absense or unavailability of the defendant or an essential witness, (4) the mental incompetence of the defendant, (5) the dismissal of charges by the government and the filing of new charges for the same offense, (6) the joint trial of co-defendants, and (7) a continuance granted by the court to serve the ends of justice. *Id.* § 3161(h)(1) to (8) (120 Cong. Rec. S22,483-84).

In addition the Act contains many provisions for the development and implementation of plans in each judicial district for the operation of the Act. Five million dollars is authorized for the development and implementation of such plans in five pilot districts. *Id.* §§ 3165-66 (120 Cong. Rec. S22,485).

[3] *Id.* § 3162 (120 Cong. Rec. S22,484).

[4] *Id.* § 3162(a)(2).

[5] *Id.* § 3173 (120 Cong. Rec. S22,486). The sixth amendment provides, "In all criminal prosecution, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend VI.

the Act will certainly lessen the need for criminal defendants in federal courts to invoke their constitutional right of speedy trial and may thus herald a new era of speedy justice in the United States.

On the eve of this new era, it seems particularly appropriate to warn against the neglect of the constitutional right of speedy trial. The development of this right must continue in the future because it stands as the ultimate barrier against denial of justice through delay.

This Note will examine the Supreme Court's four factor balancing method, as set forth in *Barker v. Wingo*,[6] for measuring deprivations of the sixth amendment guarantee of speedy trial, and how that test has been applied in well over 100 reported opinions of the lower federal courts since the *Barker* decision. It may thus be possible to determine the present status of the constitutional right of speedy trial and identify particular areas where further development is needed. Such an analysis may also serve as a reminder of the importance of the constitutional right of speedy trial in the hope that it will not stagnate under the Speedy Trial Act of 1974.

II. History

The development of the right of speedy trial as a viable, constitutionally protected right has been extremely slow. A brief examination of the few Supreme Court cases prior to *Barker* in which the right to a speedy trial was considered is necessary for an understanding of the *Barker* decision. The early Supreme Court rulings emphasized intentional or purposive delays by the prosecution as a prerequisite to a deprivation of the right to a speedy trial. In *Beavers v. Haubert*,[7] the Court noted that the

[6]407. U.S. 514 (1972) The Supreme Court had an opportunity to interpret *Barker* in the case of Moore v. Arizona, 414 U.S. 25 (1973) (discussed at text accompanying notes 21, 96-98 *infra*). The *Barker* decision was considered important as an initial step by the Court to act definitively in a long neglected area of constitutional law and spawned comments in a number of law reviews. *See, e.g.*, Uviller, Barker v. Wingo: *Speedy Trial Gets A Fast Shuffle*, 72 Colum L. Rev. 1376 (1972); 58 Cornell L. Rev. 399 (1973); 86 Harv. L. Rev. 164 (1972).

[7]198 U.S. 77 (1905). The defendant had been charged in the Eastern District of New York. When he appeared to move upon and plead to the indictments, the district attorney refused to proceed further and stated his intention to institute removal proceedings to the District of Columbia under indictments pending there against the defendant. The defendant sought to attack his removal to the District of Columbia on the grounds that it would deny him a speedy trial in New York. The Court found no speedy trial violation.

right to a speedy trial was "relative" and consistent with delays. Later, in *Pollard v. United States*,[8] the Court found no speedy trial violation because the delay was merely "accidental" rather than purposeful or oppressive. In *United States v. Ewell*,[9] the court identified what it believed were the three purposes of the constitutional guarantee of a speedy trial. Those were to prevent prejudice to a defendant due to (1) oppressive pretrial incarceration, (2) the anxiety and concern resulting from being accused of a crime, and (3) the impairment of his ability to defend himself. In *Barker*, the Court adopted these purposes in its prejudice factor.

In 1967, in *Klopfer v. North Carolina*,[10] the Court granted relief to a person because he had been deprived of a speedy trial. More importantly, however, the Court held the sixth amendment guarantee of a speedy trial to be a fundamental right secured to defendants in state courts under the due process clause of the fourteenth amendment. Again, in *Smith v. Hooey*,[11] the Court afforded some relief for deprivation of a speedy trial. The Court held that the defendant had a right to a speedy trial even though he was a prisoner in another jurisdiction. When the defendant made a demand for a speedy trial, the authorities were constitutionally required to make a diligent, good faith effort to obtain custody of the defendant and bring him to trial as soon as pos-

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[8]352 U.S. 354 (1957). The defendant pleaded guilty to a federal offense. After he left the court room, the judge entered a judgment suspending sentence and placed the defendant on probation for three years. Two years later, when the defendant violated probation, the court sentenced him to two years imprisonment and set aside its previous judgment and order. The Supreme Court viewed the sentencing process as part of the trial for speedy trial purposes. However, it noted that the original suspension of sentence was an error because the defendant was not present at the time. The imposition of the two year sentence was thus considered to be a correction of that error. Thus, the delay was found not purposeful or oppressive, but merely accidental.

[9]383 U.S. 116 (1966). The defendants were convicted of selling narcotics, but the indictments under which they were convicted failed to state the name of the purchaser. In a later and unconnected case, such indictments were declared invalid. On the basis of this later case, the defendants successfully attacked their convictions. They were immediately reindicted for the same offense, but the new indictments named the purchaser. The district court granted the defendants' motion to dismiss the new indictments on the ground that they violated the defendants' rights to a speedy trial. The Supreme Court reversed the district court.

[10]386 U.S. 213 (1967). The Supreme Court invalidated a North Carolina procedure which allowed the prosecution to nolle prosequi a charge with leave to reinstate it at a future date.

[11]393 U.S. 374 (1969).

sible. The same issue arose in *Dickey v. Florida,*[12] and the Court reversed a Florida conviction on charges filed eight years earlier while the defendant was a federal prisoner.[13] In *United States v. Marion,*[14] the Court considered the crucial question of the time at which the right of speedy trial attaches in the scheme of events leading to a criminal trial. It was held that the guarantee of a speedy trial attached only after the defendant became "accused." The Court suggested that the requirement of being "accused" could be satisfied by the filing of formal charges or by an arrest and being held to answer criminal charges.[15]

Thus, in 1972, before the *Barker* decision, all that could be said about the constitutional right to a speedy trial was that it protected only persons actually "accused" of a crime; its purpose was to prevent prejudice to an accused; and the right was not suspended because an accused was incarcerated in another jurisdiction.

III. Barker v. Wingo

In *Barker,* a fact situation arose which prompted the Court to set out criteria by which to measure deprivations of speedy trial. Willie Barker was not tried and convicted of murder until more than five years after his arrest on that charge. Barker was held in jail for the first ten months of this period but was then set free on bond until his conviction. Initially, Barker's trial was delayed by the prosecution so that a conviction of Barker's alleged accomplice could be obtained and so that the testimony of the accomplice could be used at Barker's trial. It took six trials and almost five years, however, to obtain a final conviction of Barker's accomplice. The prosecution sought and was granted a total of sixteen continuances of Barker's trial, which was originally set for October 21, 1958, but did not finally occur until October 9, 1963. The first fourteen of these continuances were requested for the purpose of delaying Barker's trial until his accomplice could be convicted. Barker's only objection to these continuances was a motion to dismiss filed by his attorney in February of 1962, after the prosecution had requested its twelfth continuance. This mo-

[12]398 U.S. 30 (1970).

[13]The defendant had made three requests to be brought to trial and it was found that he had suffered substantial impairment of his defense due to the delay.

[14]404 U.S. 307 (1971).

[15]*Id.* The Court further noted that pre-accusation delays might give rise, in certain circumstances, to due process deprivations. The court, in Favors v. Eyman, 466 F.2d 1325 (9th Cir. 1972), held that when the filing of a complaint under local law does not toll the statute of limitations, it does not engage speedy trial rights.

tion to dismiss was denied. Barker's trial was eventually set for the first term of the court following the sixth and final trial of his accomplice. The prosecution, however, requested and received two more continuances due to the illness of the chief investigating officer in the case. Barker objected to both of these last two continuances. On October 9, 1963, the final date set for trial, Barker moved to dismiss the indictment on the grounds that his speedy trial rights had been violated. This motion was denied. Trial was held, and Barker was convicted and given a life sentence. The Supreme Court granted Barker's petition for certiorari after the denial of Barker's petition for habeas corpus by a federal district court had been affirmed by the Court of Appeals for the Sixth Circuit.[16] The Supreme Court affirmed the Sixth Circuit holding that Barker's speedy trial rights had not been violated.

The four criteria identified and applied in *Barker* to determine whether there had been a denial of constitutional speedy trial rights were (1) the length of delay, (2) the reason for delay, (3) the accused's assertion of his right, and (4) the prejudice to the accused.[17] The Court expressly rejected any fixed time standard[18] or requirement that there be a demand for a speedy trial.[19] Applying the four factors to the facts in *Barker,* the Court noted that while some delay might have been justified in order to obtain a conviction of the accomplice, the extraordinary delay of over four years could not be justified. The Court further said that the illness of the chief investigating officer provided a strong excuse for the final delay of seven months. It was felt, however, that although the length of delay and the reason for the delay weighed in Barker's favor, the other two factors compelled the conclusion that Barker's speedy trial rights had not been violated. The Court noted that the prejudice suffered by Barker was minimal because Barker suffered no significant impairment of his defense as a result of the delay. Of course, it was recognized that Barker did suffer some prejudice as a result of both his initial ten month incarceration and having lived under a cloud of suspicion and anxiety for over five years. Also, the Court considered it most important that, even though near the end Barker had de-

[16]Barker v. Wingo, 442 F.2d 1141 (6th Cir. 1971), *aff'd*, 407 U.S. 514 (1972).

[17]407 U.S. at 530. The Court also noted that these were essentially the same factors as those identified by Justice Brennan in his concurring opinion in Dickey v. Florida, 398 U.S. 30, 39 (1970).

[18]Although the Court refused to measure the constitutional right of speedy trial in specific time limits, it expressly approved the fixing of specific time limits by statute and court rules.

[19]This approach was referred to as the demand-waiver doctrine. 407 U.S. at 525.

manded a speedy trial, he apparently did not actually want a speedy trial but instead preferred the delay in the hope that his accomplice would be acquitted and he himself would never be tried. As will be seen, the way in which the Court applied the four factors to the facts in *Barker* has probably had a profound affect on the lower federal courts' applications of *Barker*.

Since its decision in *Barker*, the Supreme Court has considered the right to speedy trial in *Strunk v. United States*[20] and *Moore v. Arizona*.[21] In *Strunk*, the Court was faced solely with the issue of how to remedy an admitted violation of speedy trial rights. The Court held that when the sixth amendment right of speedy trial had been abridged, the Constitution required dismissal of the criminal charges with prejudice. In *Moore*, the Court explained that under its holding in *Barker* a defendant was not required to prove impairment of his defense as a prerequisite to obtaining relief for denial of his right to a speedy trial.

IV. Barker as Applied in the Lower Federal Courts

A. Length of Delay

In discussing the length of delay in *Barker*, the Court said:

> The length of delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.[22]

Not surprisingly, the lower federal courts have apparently had some trouble understanding the Court's meaning. Although the above statement might lead one to believe otherwise, it is apparent from the Court's analysis in *Barker* that length of delay was not intended to act solely as a triggering mechanism. Rather, after triggering a complete analysis, the length of delay is to be used again as one of the factors in the balancing process. Thus, it might be said that length of delay serves a dual role. Each of these roles will subsequently be analyzed separately. There is a threshold question, however, which has apparently given some courts a problem. That is the question of how to measure the

[20] 412 U.S. 434 (1973).

[21] 414 U.S. 25 (1973).

[22] 407 U.S. at 530-31 (footnote omitted).

delay. In *United States v. Marion*,[23] the Supreme Court held that the sixth amendment right of speedy trial is engaged when one has been "accused" of a crime.[24] Thus, it would seem that the period of delay starts with accusation and ends with trial. As noted before, accusation apparently occurs either when formal charges are filed or when the defendant is arrested, whichever occurs first. However, the Court in *Barker* did not specifically state when the period of delay began to run, perhaps because the delay was so long they felt this point to be insignificant. While most courts which have considered the question since *Barker* have measured the period of delay from accusation to trial, a few have used different periods. For example, in *United States ex rel. Cole v. LaVallee*,[25] the defendant was arrested for sodomy on March 19, 1971, indicted on May 20, 1971, and tried on August 1, 1972. The court characterized the delay as fourteen months and, thus, apparently did not include the period between the arrest and the issuing of an indictment.[26]

The Fifth Circuit has developed a line of authority for the proposition that *Barker* applies only to post-indictment delays and so it would measure length of delay beginning with the date of indictment. In *United States v. Smith*,[27] the crime of which the defendant was accused occurred on May 24, 1968, and the defendant was arrested on June 24, 1968, but was not indicted until November 9, 1971. The Fifth Circuit Court of Appeals held that *Barker* did not apply even though the sixth amendment right of speedy trial was involved. Rather the court stated that the statute of limitations provided the necessary check on pre-indictment delays. The court held that the only criterion for measuring speedy trial deprivations resulting from pre-indictment delays was actual impairment of the accused's defense.[28] It is suggested that

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[23]404 U.S. 307 (1971).

[24]

> [I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Id. at 320.

[25]376 F. Supp. 6 (S.D.N.Y. 1974).

[26]In United States v. Lincoln, 494 F.2d 833 (9th Cir. 1974), the court did not consider any part of the delay except the fifteen days between the date originally set for trial and the date trial was held. In United States v. Morse, 491 F.2d 149 (1st Cir. 1974), the defendant complained only of a two month delay between the impaneling of the jury and his trial. The court considered only this time in deciding whether the defendant had been denied a speedy trial.

[27]487 F.2d 175 (5th Cir. 1973).

[28]*See also* United States v. Joyner, 494 F.2d 501 (5th Cir. 1974); United

this approach by the Fifth Circuit is clearly incorrect. The Constitution stands above the laws of the legislatures. There is no reason not to apply *Barker* to both pre-indictment and post-indictment delays.[29]

A further problem in computing delay involves the question of how to treat defense-caused delays. One approach, and the one most often used, is to count defense-caused delays in the period of delay and then to weigh the factor of reason for delay against the defendant.[30] Another possible approach, which apparently has not been tried, would be to measure the length of delay from the end of the last defense-caused delay. Finally, some courts have applied *Barker* only to the total of all non-defense-caused delays. Thus, in *United States v. Joyner*,[31] the defendant's trial was delayed twice by the government and, when the third trial date was reached, he was too ill to be tried. The court considered only the delay until the third trial date. This approach has the advantage of removing defense-caused delays from the balance, thus presumably making the balancing process easier. It is suggested, however, that defense-caused delays should be included in the balancing process. In *Joyner*, the court did not take account of the fact that had the two government-caused delays not occurred, the defendant would have been tried long before his illness. While the government had no control over the defendant's illness, the government delays were causally connected to the delay caused by the defendant's illness. The suggested approach would have allowed the court to take this into consideration.

With regard to the length of delay acting as a triggering mechanism, the Court in *Barker* was unclear as to what it meant by a "presumptively prejudicial" delay. The lower federal courts have not effectively defined the term either. A few courts have refused to consider very short delays. For example, in *United States v. Black*,[32] the court refused to consider a claim involving a delay of only three weeks, and in *United States v. Askins*,[33] a delay of eight months was considered insufficient to trigger an

States v. Zane, 489 F.2d 269 (5th Cir. 1973), *cert. denied*, 94 S. Ct. 1975 (1974); United States v. Davis, 487 F.2d 112 (5th Cir. 1973), *cert. denied*, 94 S. Ct. 1573 (1974); United States v. Schools, 486 F.2d 557 (5th Cir. 1973).

[29]Of course the sixth amendment, and thus *Barker*, does not apply to pre-indictment delays when the defendant was not arrested before his indictment. See note 24 *supra*.

[30]*See* United States *ex rel.* Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); United States v. Drummond, 488 F.2d 972 (5th Cir. 1974); Sander v. Ohio, 365 F. Supp. 1251 (S.D. Ohio 1973).

[31]494 F.2d 501 (5th Cir. 1974).

[32]480 F.2d 504 (6th Cir. 1973).

[33]351 F. Supp. 408 (D. Md. 1972).

analysis of the *Barker* factors. Most courts merely begin their analysis of all of the factors with a bald assertion that the delay involved is sufficient to trigger such an analysis.[34] Only a few courts have made use of the distinction drawn in *Barker* between street crimes and conspiracies.[35] No court has shown any inclination to identify other such distinctions. Thus it seems apparent that the lower federal courts are not making any serious attempt to define the term "presumptively prejudicial delay" nor to identify the factors to be considered in finding a delay presumptively prejudicial. A statistical analysis of the cases would probably show that a period of approximately one year is the minimum delay which most courts will consider presumptively prejudicial. However, delays of as little as six months have triggered an analysis of all the *Barker* factors.[36]

Once a presumptively prejudicial delay is found, there remains the further question of how length of delay is weighed into the balance with the other factors. The term "presumptively prejudicial" suggests that some burden may be shifted as a result of a presumption.[37] In general, however, the courts have not used the length of delay to shift any burden of proof to the prosecution. In *United States v. Hanna,*[38] the court employed the concept of a "presumptively excessive" delay which was determined by comparing the reason for the delay with the length of delay. The defendant was still required to show prejudice. In *Endres v.*

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[34]*See* United States v. Cabral, 475 F.2d 715 (1st Cir. 1973); United States v. Jones, 475 F.2d 322 (D.C. Cir. 1972); United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972); Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972); United States v. DeTienne, 468 F.2d 151 (7th Cir. 1972), *cert. denied,* 410 U.S. 911 (1973); United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211 (3d Cir. 1972); United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973); Delph v. Slayton, 355 F. Supp. 888 (W.D. Va. 1973); United States v. Brown, 354 F. Supp. 1000 (E.D. Pa. 1973); Endres v. Swenson, 352 F. Supp. 738 (E.D. Mo. 1972).

[35]*See, e.g.,* United States v. Perez, 489 F.2d 51 (5th Cir. 1973) (discussed at text accompanying note 45 *infra*); United States v. Perry, 353 F. Supp. 1235 (D.D.C. 1973). For an argument that greater delays ought to be tolerated for street crimes than for conspiracies, see Uviller, *supra* note 6, at 1384.

[36]United States v. Card, 470 F.2d 144 (5th Cir. 1972), *cert. denied,* 411 U.S. 917 (1973). *See also* Plumley v. Coiner, 661 F. Supp. 1117 (S.D. W. Va. 1973). For other examples where delays of less than one year have triggered an analysis of the other criteria, see United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972), and United States v. Strunk, 467 F.2d 969 (7th Cir. 1972), *rev'd on other grounds,* 412 U.S. 434 (1973).

[37]See Uviller, *supra* note 6, at 1384-85, in which it is suggested that such a result was clearly not intended by the Court in *Barker.*

[38]347 F. Supp. 1010 (D. Del. 1972).

Swenson,[39] the defendant had been in jail in California and a detainer had been placed on him by Missouri for a burglary charge. The defendant demanded four times that he be brought to trial in Missouri. He was not brought to trial until twenty-two months after his first demand, and after he had been released on parole by California. No reason for the delay was given by the prosecution. The court held that the delay was sufficiently long to trigger an examination of all the *Barker* factors but concluded that, because the defendant had failed to allege or prove prejudice, his speedy trial rights had not been violated.[40]

A few courts, however, have shifted the burden of proof to the prosecution after finding a presumptively prejudicial delay. In *United States v. Rucker*,[41] for example, the court placed on the prosecution the necessity to provide justification for the delay, "the burden of which increases with the length of the delay."[42] Another approach, taken in *United States v. Macino*,[43] is to weigh the factor of reason for delay against the prosecution when no reason for delay is given. It appears, however, that most lower federal courts have read *Barker* to mean that the concept of "presumptively prejudicial delay" is used only when the delay is used as a triggering mechanism and, when the delay is weighed in with the other factors, there is no presumption of prejudice. Thus the concept of presumptively prejudicial delay is employed by most courts only to dispose summarily of frivolous claims. It is suggested that this is probably what the Supreme Court had in mind when it used the term, and so these courts are correct in their analyses.

It may be considered obvious that the greater the length of delay, the greater weight it should be accorded in the defendant's favor. Almost certainly this is an unstated proposition in every court's application of the *Barker* factors. It is regrettable, however, that the length of delay was so great in *Barker*. Many long delays, when compared with the almost five year delay in *Barker*, appear less excessive by comparison. It is possible that several courts have used such a comparison as an excuse to accord the length of delay less than the weight to which it should be entitled.[44] The comparison of one case with another is not to be condemned so long as it is remembered that the different circum-

[39]352 F. Supp. 738 (E.D. Mo. 1972).

[40]It is possible that the court was influenced by the fact that the defendant had escaped from custody after he was first arrested in Missouri.

[41]464 F.2d 823 (D.C. Cir. 1972), *cited in* United States v. Perry, 353 F. Supp. 1235 (D.D.C. 1973).

[42]464 F.2d at 825.

[43]486 F.2d 750 (7th Cir. 1973).

[44]*See, e.g.*, United States *ex rel.* Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973).

stances of each case must be taken into account before any meaningful comparison of factors can be made. In *United States v. Perez*,[45] however, the court carried such a comparison to an extreme. The defendant had been convicted of conspiracy and mail fraud after a three year delay between his indictment and his trial. The court held that the case was controlled by another conspiracy case[46] which involved a less lengthy delay, and for this reason, the court refused even to consider whether the three year delay was sufficient to trigger an analysis of the *Barker* factors.[47]

One final problem area with the length of delay factor involves the question of how to handle a situation in which the delay is not long enough to be presumptively prejudicial, but the defendant can prove actual prejudice. In *United States v. Askins*,[48] it was implied that in such a situation a court should consider all the *Barker* factors. In *Askins*, the court held that an eight month delay between the defendant's arrest and indictment, if not accompanied by an allegation of actual prejudice, would not satisfy "the defendant's initial burden."[49] Since the purpose of the guarantee of speedy trial is to prevent prejudice to an accused,[50] it would seem that an allegation and proof of prejudice could serve as a triggering mechanism regardless of the length of delay. Of course, if the prejudice does not result from the delay, the issue is more one of due process than of speedy trial.

B. Reason for Delay

> This factor was discussed in *Barker* as follows:
> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a

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[45]489 F.2d 51 (5th Cir. 1973).

[46]United States v. Lane, 465 F.2d 408 (5th Cir. 1972).

[47]

> Because we hold that this case is controlled on its specific facts by *Lane*, we expressly decline to decide whether a three year and twenty-three day delay in a complex conspiracy case is sufficient to pull the trigger.

489 F.2d at 72 n.39.

[48]351 F. Supp. 408 (D. Md. 1972).

[49]*Id.* at 416.

[50]United States v. Ewell, 383 U.S. 116 (1966).

> valid reason, such as a missing witness, should serve to justify appropriate delay.[51]

Implicit in this discussion is, of course, the idea that the defendant may only complain of delays which he has not caused, and the cases since *Barker* have uniformly held this to be so.[52] As noted above, there may be some question as to whether to exclude defense-caused delays from consideration altogether or to include them and weigh their causes against the defendant. Since the latter approach allows more flexibility in its application, it would appear preferable.

The Supreme Court apparently placed all reasons for delay into two broad categories: those which justify some delay, and those which do not justify delays. Beyond this, reasons which do not justify delays may be ranked by how heavily they weigh against the prosecution. As to the valid reasons which justify an appropriate delay, the lower federal courts have recognized the "missing witness" reason suggested by the Supreme Court. In *United States v. Fasanaro,*[53] a delay of over four years was held justified because an important prosecution witness could not be located. In so holding, the court apparently also relied on its impression that the defendant did not want a speedy trial but preferred to wait in the hope that the witness would never be found. Thus it is doubtful whether a delay of four years could be justified solely by the lack of a witness. It is apparently not necessary that a witness be "missing;" it is sufficient that he is unavailable. In *Torres v. Florida,*[54] a delay of seventeen months was held justified because a witness was unable to testify because of gunshot wounds received during the alleged crime. In *United States v. Counts,*[55] a delay was justified until the chief prosecution witness completed a tour of duty in Viet Nam.

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[51] 407 U.S. at 531 (footnote omitted).

[52] *See* United States *ex rel.* Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); United States v. Nathan, 476 F.2d 456 (2d Cir. 1973); United States v. Counts, 471 F.2d 422 (2d Cir.), *cert. denied,* 411 U.S. 935 (1973); United States v. Pollard, 466 F.2d 1 (10th Cir. 1972); Sander v. Ohio, 365 F. Supp. 1251 (S.D. Ohio 1973); United States v. Perry, 353 F. Supp. 1235 (D.D.C. 1973). A related problem was discussed in United States v. Phillips, 482 F.2d 191 (8th Cir. 1973), in which it was said that speedy trial rights may be impaired by a co-defendant's request for a continuance.

[53] 471 F.2d 717 (2d Cir. 1973). *See also* United States v. Douglas, 488 F.2d 1331 (D.C. Cir. 1973); United States v. Anderson, 471 F.2d 201 (5th Cir. 1973); United States v. Saglimbene, 471 F.2d 16 (2d Cir. 1972). *Cf.* United States v. Boatner, 478 F.2d 737 (2d Cir. 1973); United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973).

[54] 477 F.2d 555 (5th Cir. 1973).

[55] 471 F.2d 422 (2d Cir. 1973).

In addition, the lower federal courts have identified a variety of other reasons which may justify an appropriate delay. In *United States ex rel. Little v. Twomey,*[56] the defendant was committed to a hospital for almost three years before he was found competent to stand trial. The delay was held justified.[57] In *United States v. Taylor,*[58] a delay of over one year was held justified because of the nature and complexity of the crime—selling stolen automobiles. It has also been held that when a prosecution witness makes conflicting pretrial statements, a reasonable delay may be justified for the purpose of resolving the inconsistencies and preparing for impeachment of the witness.[59] In *United States v. DeTienne,*[60] the desire of the prosecution to conduct a joint trial of two defendants was held to justify an almost nineteen month delay. If the prosecution must dismiss an indictment because of improper grand jury proceedings, *United States v. Merrick*[61] held that a delay pending impaneling of a new grand jury is justified. In *United States v. Galardi,*[62] the court said that a reasonable delay could be justified by the prosecutor's good faith belief that the defendant wished to use the procedure provided for in the Federal Rules of Criminal Procedure.[63] Certainly other justifications for delay exist, even though they have not been noted by the lower federal courts since *Barker.* It is commendable that the courts have identified so many justifications, but in the future the great danger will be that the line between reasons which justify delays and the "more neutral" reasons which do not justify delays will become blurred. For example, in the *Merrick* case,

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[56]477 F.2d 767 (7th Cir. 1973).

[57]For a Supreme Court discussion of how long a person can be committed in order to ascertain his competency to stand trial, see Jackson v. Indiana, 406 U.S. 715 (1972).

[58]469 F.2d 284 (3d Cir. 1972). *See also* United States v. Lane, 465 F.2d 408 (5th Cir. 1972); United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211 (5th Cir. 1972).

[59]Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972). Although the court indicated a reasonable delay would have been tolerated, the defendant's conviction was reversed because the delay was nineteen months and the defendant had suffered significant prejudice to his defense.

[60]468 F.2d 151 (7th Cir. 1972). *See also* United States v. Annerino, 495 F.2d 1159 (7th Cir. 1974).

[61]464 F.2d 1087 (10th Cir. 1972).

[62]476 F.2d 1072 (9th Cir. 1973). *See also* United States v. Strunk, 467 F.2d 969 (7th Cir. 1972).

[63]FED. R. CRIM. P. 20 provides a method whereby a person arrested and held in a district other than the one in which the indictment, information, or warrant was issued may state in writing that he wishes to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or warrant was issued, and may thereby consent to a disposition of the case in the district in which he is being held.

it is conceivable that the government should have assumed responsibility for the improper grand jury procedures, and the delay should have been weighed against the prosecution.

It might be suggested that the analysis of the *Barker* factors should stop upon finding that a delay was justified. In general, however, most courts have completed their analyses of all the *Barker* factors. Although this is probably done to avoid being later overruled, two considerations support completing the weighing of all factors even when the delay is held justified. First, even a justifiable delay might be outweighed by another factor such as impairment of defense. Thus, in *United States v. Canty*,[64] the court stated that when a government-caused delay was partially excusable, the defendant might have been discharged had he incurred substantial prejudice.[65] Secondly, the amount of delay which a reason will justify may depend on other factors. For example, while a desire to hold a joint trial of accomplices is recognized to justify some delay, it might not provide any justification for delay after one defendant makes a demand to be tried or suffers some prejudice to his defense.[66]

The cases which have considered the "more neutral" reasons which do not justify delays have tended not to weigh these very heavily against the prosecution.[67] Thus, in *United States v. Cabral*,[68] there was a fifteen month delay between the defendant's arrest for possession of an illegal weapon and his indictment. The court attributed the delay to government neglect and noted that the defendant had asserted his right to a speedy trial in a timely fashion. Nevertheless, relief was denied because the only preju-

[64]469 F.2d 114 (D.C. Cir. 1972).

[65]Despite this language, the court failed to find any substantial prejudice in the death of an alibi witness, the loss of witnesses' memories, and the impairment of a defense of mental incompetence.

[66]*Cf.* United States v. LaBorde, 496 F.2d 965 (6th Cir. 1974).

[67]The case of United States *ex rel.* Little v. Twomey, 477 F.2d 767 (7th Cir. 1973), is particularly disconcerting in this respect. The court failed to answer conclusively whether or not the defendant had been denied due process at a competency hearing, and whether or not the state should have brought him to trial after that hearing. Thus, the court was apparently unsure whether the sixteen month interval before the next competency hearing constituted a delay in bringing the defendant to trial. But, if it was such a delay, the court dismissed it as being less than the delay in *Barker*. *See also* United States v. Toy, 482 F.2d 741 (D.C. Cir. 1973). On the other hand, at least one recent case granted relief for a two year delay in bringing a defendant to trial which was found to have resulted solely from government inadvertance and negligence. The significance of this factor is difficult to determine, however, since the court also found an impairment of the defense, which impairment was termed "devastating." Wylie v. Wainwright, 361 F. Supp. 914 (S.D. Fla. 1973).

[68]475 F.2d 715 (1st Cir. 1973).

dice alleged was loss of the opportunity to serve his sentence concurrently with a state sentence received as a result of the same arrest. The court thought this was too "speculative" and implied the necessity of showing actual prejudice. Relief was granted to the defendant in only two of the cases surveyed where the reasons for delay were crowded dockets or understaffing of the United States Attorney's office.[69] Those were *United States v. Strunk*,[70] and *United States v. Perry*.[71] In *Strunk* there was an eight month delay between indictment and arraignment. The prosecution could offer no acceptable reason for the delay other than that the United States Attorney's office was understaffed. The court rejected this reason.[72] The only prejudice claimed by the defendant was the delay in starting his sentence. The court attempted to remedy the situation by crediting the length of delay against the defendant's sentence.[73] In *Perry*, a three year delay occurred in the defendant's trial for robbery, which the prosecution attributed to understaffing of his office and overcrowded dockets. The court held that even though the defendant had not requested a speedy trial, he should be discharged because there was presumed to be a "reasonable possibility of significant prejudice" due to a three year delay in the trial of an ordinary street crime. In addition, the defendant had lost his job because of his pretrial incarceration. At least one court has taken the approach that when no reason is offered by the government to explain a delay, that factor will weigh against the government.[74] This approach seems fair, since the government ought to take responsibility for any delay it cannot justify in some manner.

When a delay has been intentionally caused by the government for the purpose of hampering the defense or for other questionable purposes, courts have been quick to grant relief. For

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[69]For examples of instances in which relief was not granted, see United States v. LaBorde, 496 F.2d 965 (6th Cir. 1974); United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973); United States v. Jones, 475 F.2d 322 (D.C. Cir. 1972); United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972); United States v. Schwartz, 464 F.2d 499 (2d Cir. 1972); United States v. Altro, 358 F. Supp. 1034 (E.D.N.Y. 1973); and Delph v. Slayton, 355 F. Supp. 888 (W.D. Va. 1973).

[70]467 F.2d 969 (7th Cir. 1972).

[71]353 F. Supp. 1235 (D.D.C. 1973).

[72]The language of the court was: "[M]oreover, we summarily reject the additional reason for the delay, the characterization of the United States Attorney's office as understaffed." 467 F.2d at 972.

[73]On appeal to the Supreme Court this was reversed. The Court held the only permissible remedy to be discharge of the defendant. United States v. Strunk, 412 U.S. 434 (1973).

[74]United States v. Macino, 486 F.2d 750 (7th Cir. 1973).

example, in *Arrant v. Wainwright*,[75] the state attorney asserted as his reason for the delay that "he didn't want to see [the defendant] acquitted."[76] The appellate court reversed the conviction. In *United States v. Jackson*,[77] at a pretrial conference held on December 18, 1973, the court ordered discovery closed on March 1, 1974, and ordered all parties to file with the court by April 1, 1974, a stipulation of the issues not in dispute, an agreed statement of the issues in dispute, lists of all witnesses to be called, copies of all exhibits (pre-marked), and trial briefs which included each party's theories of the case. The government made no objection to this order either at the pretrial conference or during the interim period before April 1. On April 1, the government, instead of making the required filings, filed a motion for clarification of the order contending that it did not have to reveal its witnesses or its theories of the case. The court gave the government until April 8 to comply with the order, but the government refused to do so. The court then dismissed the case against one of the defendants because of denial of speedy trial.

Thus, it appears that the lower federal courts have made use of the distinction drawn in *Barker* between the more neutral reasons for delay and the purposeful delays. It is suggested, however, that this distinction is of questionable merit. Although the constitutional right of speedy trial serves some of society's interests, it is primarily an individual right for the protection of accused persons. From the accused's point of view, the distinctions between different reasons for delay are irrelevant so long as the delay is not his fault. It is ultimately the government's burden to provide a speedy trial, and the individual accused should bear no responsibility for procuring a speedy trial other than the responsibility not to obstruct the orderly processes of justice. Thus it would seem that if the government cannot provide enough courts so that the dockets will not be overcrowded, or enough personnel so that prosecutor's offices will not be understaffed, or if a delay occurs because of the negligence or inadvertance of one charged with the administration of justice, then the accused has been denied a speedy trial just as surely as if someone had decided not to try the accused because he should not be allowed back on the streets.

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[75]468 F.2d 677 (5th Cir. 1972). *See also* United States v. Hanna, 347 F. Supp. 1010 (D. Del. 1972). It has been suggested that once a defendant shows what amounts to malice on the part of the prosecution, the analysis of the *Barker* criteria should cease, and the defendant should be discharged. Uviller, *supra* note 6, at 1385.

[76]468 F.2d 677, 681 (5th Cir. 1972).

[77]374 F. Supp. 168 (N.D. Ill. 1974).

If it is felt that the distinction between intentional delays and more neutral delays is necessary, then it is suggested that a shift of emphasis must be made. Intentional delays, so long as the length of delay is not insignificant, should result automatically in a finding that the right of speedy trial has been abridged. Like the exclusionary rule under the fourth amendment, this would have a prophylactic effect. There is no excuse for intentional or purposive delays in bringing an accused to trial and such delays should not be tolerated. All other reasons for delay for which the government bears the responsibility should be weighed heavily against the government.

C. Assertion of the Right

With respect to the defendant's assertion of his right to a speedy trial, the Court in *Barker* said:

> Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, thus is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.[78]

In addition, as noted above, the Court rejected a demand-waiver approach under which a defendant would be considered to have waived his right to a speedy trial unless he asserted it.[79] In spite of this, it appears that if the accused is a prisoner of another jurisdiction, some courts still apply a demand-waiver rule. In so doing, these courts are apparently following the language of the earlier Supreme Court case of *Smith v. Hooey*.[80] For example, in

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[78] 407 U.S. at 531-32.

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> We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.

Id. at 528 (footnote omitted).

[80] 393 U.S. 374 (1969). The Court said: "Upon the petitioner's demand,

Gerberding v. United States,[81] the defendant failed to demand a speedy trial while he was serving a state sentence on a previous conviction. The court held there was no violation of his speedy trial rights. On the other hand, under similar circumstances, when a defendant does make a request to be brought to trial, and the authorities fail to act on his request, many courts have been quick to grant relief. For example, in *Moulton v. Aaron*,[82] the court ruled that Texas detainers placed on a federal prisoner could not be enforced to limit the prisoner's activities and rights while in prison. The prisoner had made numerous inquiries to Texas authorities, and a show cause order had previously been issued against the authorities by the federal court. Texas authorities had nevertheless taken no action to bring the prisoner to trial on the Texas charges during the twenty months that the detainers had been pending.

It is quite possible that the actual holding in *Barker* seriously undercut the Court's rejection of a demand-waiver approach.[83] It seems, however, that the Court merely recognized the difference between an accused's demand for or assertion of his right to a speedy trial and an accused's actual desire for a speedy trial. This distinction was a prime consideration of the Court in reach-

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Texas had a constitutional duty to make a diligent good faith effort to bring him before the Harris County Court for trial." *Id.* at 383.

[81] 471 F.2d 55 (8th Cir. 1973). *Contra*, Clark v. Oliver, 346 F. Supp. 1345 (E.D. Va. 1972). In *Clark*, the defendant was not aware of the nature of the charges against him and the court found that he had suffered significant prejudice to his defense. *Cf.* Jordan v. Beto, 471 F.2d 779 (5th Cir. 1973); United States v. Schwartz, 464 F.2d 499 (2d Cir. 1972); United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973).

[82] 358 F. Supp. 256 (D. Minn. 1973). Also see Haynie v. Henderson, 357 F. Supp. 1004 (N.D. Ga. 1973), in which a similar action was dismissed for lack of jurisdiction. It was held that the prisoner's remedy when the state failed to act on his demand to be brought to trial was an original action in the state supreme court. *See also* Norris v. Georgia, 357 F. Supp. 1200 (W.D.N.C. 1973); Leonard v. Vance, 349 F. Supp. 859 (S.D. Tex. 1972). In Endres v. Swenson, 352 F. Supp. 738 (E.D. Mo. 1972), the defendant made five demands to be brought to trial, but no action was taken on his demands. No violation of speedy trial rights was found.

[83] In referring to the Court's statement that a defendant who fails to assert his right of speedy trial will find it difficult to prove he was denied a speedy trial, Professor Uviller said:

> Here is a solemn pronouncement to be reckoned with. It is underscored still more emphatically later when the Court deals with the facts before it. This message washes over the Court's earlier dutiful recital of orthodox waiver theory, all but obscuring its shape. Waiver is not to be automatically inferred from silence, perhaps, but woe betide the silent defendant who makes no effort to bring himself to trial. Like Barker, his is an uphill, well-nigh impassible climb.

Uviller, *supra* note 6, at 1388.

ing its decision that Barker had not been denied a speedy trial. The distinction seems to be an appropriate one. There are many circumstances in which an accused might fail to demand a speedy trial and still desire one. In these circumstances the defendant's failure to demand a speedy trial should not weigh against him. For example, an accused not represented by counsel may not even be aware of his right to a speedy trial or the procedure for obtaining one.[84] An accused may not understand the nature of the charges against him and this may contribute to his failure to demand a speedy trial.[85] In *United States v. Hanna*,[86] the defendant was promised that he would not be indicted if he gave a statement implicating another person and cooperated in the prosecution of that person. The government delayed obtaining an indictment in order to induce the defendant to fulfill his bargain. Under these circumstances, the court held that the failure of the defendant to assert his right to a speedy trial should not weigh against him. Similarly, in *United States v. Macino*,[87] the court discounted the fact that the defendant had not requested a speedy trial prior to his indictment. The court felt that it was reasonable for the defendant to hope he would never be indicted and that the defendant should not be forced to seek his own prosecution.

The defendant who knows of his right to a speedy trial and desires to assert it has the additional dilemma of deciding when to make his assertion. There is always the danger that a court will focus its attention only on delay which occurs after a defendant's demand for trial.[88] In order to avoid this, a defendant should assert his right as early as possible. This may also have the effect of making future delays less "neutral." By asserting his right early, however, the defendant runs the risk that he may be forced to seek a continuance or accept a trial before he is ready. If he seeks a continuance, he will be charged with the delay caused and this will weaken any subsequent claim that his

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[84]In United States v. Dyson, 469 F.2d 735 (5th Cir. 1972), the government was ordered to show cause for a two year delay in trying a defendant on draft evasion charges or dismiss the charges. *Cf.* United States v. Burnett, 476 F.2d 726 (5th Cir. 1973). The court failed to grant any relief to a defendant for a thirty month delay in bringing him to trial on draft evasion charges because he had not requested to be tried. The defendant was represented by counsel, and the court distinguished *Dyson* on this basis. *Contra*, United States v. Cabral, 475 F.2d 715 (1st Cir. 1973). The court denied the defendant any relief despite saying that his failure to assert his right was mitigated by a lack of knowledge as to whether he would ultimately be prosecuted and by a lack of counsel.

[85]*See* Clark v. Oliver, 346 F. Supp. 1345 (E.D. Va. 1972).

[86]347 F. Supp. 1010 (D. Del. 1972).

[87]486 F.2d 750 (7th Cir. 1973).

[88]*See, e.g.*, United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972).

speedy trial rights were violated. In addition, the court may deem his request for a continuance inconsistent with his demand for a speedy trial.[89] Both the defendant and the prosecution need a reasonable time to prepare their cases. In protecting the right of speedy trial, no defendant ought to be tried before he is ready, and at the same time he should not have to endure delays beyond a reasonable time for the prosecution to prepare its case. In *Arrant v. Wainwright,*[90] the court specifically recognized the defendant's dilemma and held that he need not assert his right to a speedy trial until an unreasonable delay occurs.

The distinction drawn in *Barker* between a defendant's assertion of his right and his desire for a speedy trial is a necessary distinction. It appears from the Court's decision in *Barker* that the really crucial factor is the defendant's desire for a speedy trial. The defendant's demand for a speedy trial is evidence of his desire for one, but clearly there may be other indicia which lead to the conclusion that the defendant actually preferred the delay over going to trial. In these circumstances the holding in *Barker* would seem to indicate that the defendant's speedy trial rights have not been violated. The difficulty is, of course, that it may be nearly impossible for a court to determine whether a defendant actually wanted a speedy trial. When the right is asserted, a presumption should arise that the defendant desired a speedy trial, which presumption could be overcome by other evidence, as was the case in *Barker.* On the other hand, the language of the Court in *Barker,* to the effect that it would be very difficult for a defendant to prove he was denied a speedy trial if he failed to assert his right, would seem to raise a presumption when a defendant does not assert his right to a speedy trial that he did not desire one. This presumption also may be overcome by appropriate evidence or other circumstances.[91]

Unfortunately, the lower federal courts have engaged in no such analysis of the *Barker* decision. They have often weighed heavily against the defendant his failure to assert his right to speedy trial.[92] Only a few courts have suggested that they were

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[89]*See, e.g.,* Torres v. Florida, 477 F.2d 555 (5th Cir. 1973).

[90]468 F.2d 677 (5th Cir. 1972).

[91]See text accompanying notes 84-87 *supra.*

[92]*See, e.g.,* United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973); United States v. Phillips, 477 F.2d 913 (5th Cir. 1973); United States v. Cabral, 475 F.2d 715 (1st Cir. 1973); United States v. Jones, 475 F.2d 322 (D.C. Cir. 1972); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972); United States v. Parish, 468 F.2d 1129 (D.C. Cir. 1972); United States v. Rodriguez, 375 F. Supp. 589 (S.D. Tex.), *aff'd,* 497 F.2d 172 (5th Cir. 1974); Sander v. Ohio, 365 F. Supp. 1251 (S.D. Ohio 1973); United States v. Orbiz, 358 F. Supp. 200 (D.P.R. 1973); United States v. Dornau, 356 F. Supp.

concerned with whether the defendant desired a speedy trial.[93] It thus appears that the lower federal courts have been extremely deficient in their analysis of the assertion of right factor. The decisions have invariably dealt with an analysis of all the *Barker* factors and, thus, it is impossible to isolate the defendant's assertion of his right to a speedy trial and determine exactly how it is being weighed into the balance. However, the summary fashion with which most courts have dealt with this factor, and their failure to mention the distinction between a defendant's assertion of his right and his desire for a speedy trial, indicate that this crucial factor is probably not receiving the weight it deserves. This is due in large part to the failure of the Court in *Barker* to make itself clear and to the lingering effects of the demand-waiver rule which many courts used prior to the *Barker* decision. In order to correct the situation, it will probably be necessary for the Supreme Court to issue a decision in which it explains the meaning of its decision in *Barker*. If the analysis of *Barker* suggested above is correct, then the Court should make clear that the real concern is whether a defendant wanted a speedy trial, not whether he asserted his right to a speedy trial. The assertion of the right is merely evidence of his desire for a speedy trial. The Court should also make clear what presumptions arise through the assertion or non-assertion of the right to a speedy trial.

D. Prejudice to the Defendant

The Supreme Court said in *Barker* that the analysis of prejudice to the defendant should be conducted within the three categories of prejudice which the right of speedy trial is designed to prevent: (1) oppressive pretrial incarceration, (2) the anxiety and concern of being accused of a crime, and (3) impairment of defense.[94] The Court in *Barker* further stated:

> Of these interests the most serious is the last [impairment of defense], because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if the defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is

1091 (S.D.N.Y. 1973); DeMasi v. United States, 349 F. Supp. 747 (S.D.N.Y. 1972).

[93]United States v. Burnett, 476 F.2d 726 (5th Cir. 1973); United States v. Fasanaro, 471 F.2d 717 (2d Cir. 1973); United States v. Saglimbene, 471 F.2d 16 (2d Cir. 1972).

[94]United States v. Ewell, 383 U.S. 116 (1966).

> not always reflected in the record because what has been forgotten can rarely be shown.[95]

The extra emphasis on impairment of defense was perhaps unfortunate. It may have resulted in many courts viewing impairment of defense as a sine qua non of speedy trial deprivations. In November of 1973, in *Moore v. Arizona*,[96] the Supreme Court said that *Barker* "expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial."[97] However, most lower federal court decisions since the Supreme Court decision in *Moore* have failed to mention the *Moore* case. Many have placed heavy emphasis on the lack of impairment of defense in denying speedy trial claims.[98] It may be hoped that in the future more courts will become aware of the *Moore* decision and stop overemphasizing impairment of defense.

While the Supreme Court in *Barker* felt that prejudice is obvious when witnesses die or disappear during a delay, this prejudice apparently has not been so obvious to the lower federal courts. Many have placed a heavy burden on the defendant to show the actual prejudice which resulted. Thus, in *United States v. Davis*,[99] the court held that although one of the defense witnesses was missing because of the delay, the testimony of that witness would merely have been cumulative. In *United States v. Jones*,[100] the court doubted whether an alleged alibi witness ever really existed and said that "the overwhelming evidence against appellant belies any thought that the witness . . . could possibly have swayed the jury's verdict."[101] In *United States v. Schwartz*,[102] the court circumvented the death of a defense witness who had been ill by holding that the defendant, knowing that the witness might possibly die, should have obtained a deposition. In contrast is *United States v. Macino*,[103] in which a co-defendant had

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[95]407 U.S. at 532.

[96]414 U.S. 25 (1973).

[97]*Id.* at 26.

[98]United States v. LaBorde, 496 F.2d 965 (6th Cir. 1974); United States v. Annerino, 495 F.2d 1159 (7th Cir. 1974); United States *ex rel.* Walker v. Henderson, 492 F.2d 1311 (2d Cir. 1974); United States v. Morse, 491 F.2d 149 (1st Cir. 1974); United States v. Heinlein, 490 F.2d 725 (D.C. Cir. 1973).

[99]487 F.2d 112 (5th Cir. 1973).

[100]475 F.2d 322 (D.C. Cir. 1972).

[101]*Id.* at 325. *See also* Gerberding v. United States, 471 F.2d 55 (8th Cir. 1973); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972); United States v. Lane, 465 F.2d 408 (5th Cir. 1972); United States v. Merrick, 464 F.2d 1087 (10th Cir. 1972); United States v. Brown, 354 F. Supp. 1000 (E.D. Pa. 1973).

[102]464 F.2d 499 (2d Cir. 1972).

[103]486 F.2d 750 (7th Cir. 1973).

died during the delay. Although there was no evidence that his testimony would have been helpful to the defendant, the court felt that the death of such a witness, with firsthand knowledge of the events at issue, created a strong possibility of prejudice. Of course, when the loss or death of a witness occurs before the government becomes chargeable with any delay, the defendant cannot claim prejudice to his speedy trial rights.[104]

The Supreme Court in *Barker* also recognized that lost or dimmed memories seldom reveal themselves in transcripts. Nevertheless, many lower federal courts have required affirmative evidence of impairment of witnesses' memories and, in the absense of such affirmative evidence, have held the possibility of prejudice to be too "speculative."[105] In addition, many courts have required the defendant to show that the dimming of witnesses' memories was prejudicial rather than helpful. Thus, in *United States v. Heinlein*,[106] the court found that the dimmed memories prejudiced the prosecution as much or more than they prejudiced the defense.[107]

While stressing the need for impairment of defense in order to successfully claim denial of the right to a speedy trial, the lower federal courts have tended to ignore the prejudice resulting from pretrial incarceration and the anxiety and concern of being accused of a crime.[108] Generally, the courts have not mentioned the prejudice resulting from pretrial incarceration except to say that there was none in cases in which the defendant was

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[104]United States v. Anderson, 471 F.2d 201 (5th Cir. 1973). The defendant was arrested on May 11, 1971, and his trial was originally set for September 27, 1971. Trial was delayed by government continuances until March 8, 1972. The co-defendant was killed on June 15, 1971. The defendant raised a speedy trial claim, saying that his defense had been prejudiced by the death of his co-defendant. The court held that since there was only a one month delay before the co-defendant's death, the defendant could not properly assign this as prejudice resulting from denial of his speedy trial rights.

[105]*See, e.g.*, United States v. Churchill, 483 F.2d 268 (1st Cir. 1973); United States v. Toy, 482 F.2d 741 (D.C. Cir. 1973); United States v. Galardi, 476 F.2d 1072 (9th Cir. 1973); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972); Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972); United States v. DeTienne, 468 F.2d 151 (7th Cir. 1972); United States v. Taylor, 465 F.2d 1199 (10th Cir. 1972); United States v. Lane, 465 F.2d 408 (5th Cir. 1972). It has been observed that proof of loss of memory is so difficult that the party with the burden of proof on this point will find it impossible to bear. 86 HARV. L. REV. 164 (1972).

[106]490 F.2d 725 (D.C. Cir. 1973).

[107]*See also* United States v. Merrick, 464 F.2d 1087 (10th Cir. 1972).

[108]The down-grading of these two types of prejudice in *Barker* has received criticism. 86 HARV. L. REV. 164 (1972).

not incarcerated. Furthermore, in *Wylie v. Wainwright,*[109] the court stated that since the defendant was in jail on a previous conviction, there was no prejudice resulting from pretrial incarceration. The court further suggested that the prejudice resulting from the anxiety and concern over being accused of a crime was minimized by the defendant's extensive background in penal institutions.

The contrast between two cases decided by the Seventh Circuit Court of Appeals is illustrative of the failure of the lower federal courts to accord proper weight to the anxiety and concern of being accused of a crime. In *United States v. Annerino,*[110] the court found no deprivation of speedy trial. With regard to the anxiety and stigma of being accused of a crime, the court said that "conclusory allegations of general anxiety and depression, travel restrictions and an inability to secure employment constitute a showing of only minimal prejudice of a kind normally attending criminal indictment."[111] In contrast is *United States v. Macino,*[112] in which the court found that the defendant had been denied a speedy trial. With regard to the anxiety and stigma which attach to being accused of a crime, the court said, "we must recognize that they exist despite the fact that a trial transcript or court record will seldom reveal them. Nor can this form of prejudice be treated lightly."[113] In neither *Macino* nor *Annerino* was the defendant incarcerated during the delay. The delay in *Macino* was twenty-eight months, while the delay in *Annerino* was about sixteen months. In *Annerino* the delay was caused by the government's desire to have a joint trial of co-defendants. In *Macino* no reason was offered by the government for the delay. Also, in *Macino* the court found a strong possibility of impairment of defense.[114] All of these differences may well justify the difference in the outcome of the two cases. However, the striking difference in the way the court treated the prejudice resulting from the anxiety and concern of being accused of a crime would hardly seem justified on the facts.

There are a few cases in which the burden on the defendant to prove actual prejudice has been eased. In *Hoskins v. Wainwright,*[115] there was a delay of eight and one-half years in bringing the defendant to trial for attempted robbery. The Fifth Cir-

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[109]361 F. Supp. 914 (S.D. Fla. 1973).

[110]495 F.2d 1159 (7th Cir. 1974).

[111]*Id.* at 1163-64.

[112]486 F.2d 750 (7th Cir. 1973).

[113]*Id.* at 753.

[114]See text accompanying note 103 *supra.*

[115]485 F.2d 1186 (5th Cir. 1973).

cuit Court of Appeals had previously remanded for a hearing on the question of whether the defendant had suffered any prejudice because of the delay.[116] On remand, the state court found that the defendant had not been prejudiced by the delay, and the district court accepted this finding. The court of appeals, however, finally realized that prejudice was not the sine qua non for judicial relief for a deprivation of speedy trial and reversed the defendant's conviction.[117] As noted above, in *United States v. Macino*,[118] the court granted relief to the defendant after finding a reasonable possibility of prejudice.[119]

If the sixth amendment guarantee of speedy trial is to be adequately protected, the lower federal courts must begin to heed the following language of the Supreme Court: "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense."[120] The lower federal courts must give up their misplaced emphasis on impairment of defense, which after all may be more a due process question, and begin to give proper emphasis to the prejudice resulting from pretrial incarceration and the anxiety and concern of being accused of a crime.

V. Remedies

The dismissal of charges against a defendant because he has been deprived of a speedy trial is a very severe remedy.[121] It may mean that a guilty person will be set free before trial or even after having been convicted. According to the Supreme Court, however, dismissal of charges is the only remedy allowed by the Constitution. The severity of this remedy probably provides an

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[116]Hoskins v. Wainwright, 440 F.2d 69 (5th Cir. 1971).

[117]"[T]here must be some point of coalescence of the other three factors in a movant's favor, at which prejudice—either actual or presumed—becomes totally irrelevant. And we so hold." 485 F.2d at 1192.

[118]486 F.2d 750 (7th Cir. 1973).

[119]See text accompanying note 103 *supra*. In United States v. Perry, 353 F. Supp. 1235 (D.D.C. 1973), the court found that a reasonable possibility of significant prejudice existed as a result of a three year delay in the trial for a street crime, and the court dismissed the charges.

[120]United States v. Marion, 404 U.S. 307, 320 (1971).

[121]

> But such severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain as *Barker* noted, "the only possible remedy."

Strunk v. United States, 412 U.S. 434, 439-40 (1973).

atmosphere which pressures many courts to go to almost any length to avoid finding deprivations of speedy trial. There is no way of knowing how many of the decisions surveyed may have been in some way motivated by this consideration. There are at least two possible solutions to this problem. The first is to define more rigidly the constitutional right to speedy trial and thus to deprive the courts of some of the discretion they now enjoy. This solution would be unfortunate. The variables involved in speedy trial questions are highly complex, and the courts need wide discretion in order to deal properly with the vast number of possibilities. The second solution is to enact, by statute or court rules, safeguards which are more stringent than the Constitution requires for the protection of speedy trial. This possibility will be discussed in the next section.

Another interesting possibility in the area of remedies for speedy trial deprivations is the class action suit. In *Wallace v. Kern*,[122] the inmates of the Brooklyn House of Detention for Men brought a class action seeking an injunction to enforce their rights to speedy trial. The court noted that the delays of justice for inmates of that institution were "notorious" and "chronic." The court further noted that the prejudice caused by incarceration may be mitigated by releasing the defendant without dismissing the charges. The court issued a preliminary injunction which in effect provided that no one should be held in the institution pending trial for more than six months.

VI. Conclusion

The sixth amendment guarantee of speedy trial is still not a viable, well defined constitutional right. The Supreme Court's decision in *Barker* was a small and confusing step in the right direction. Unfortunately, the lower federal courts have not moved forward from that decision. They have not made any significant attempt to define the concept of "presumptively prejudicial delay." There is a great need for a reconsideration of the reason-for-delay factor of the *Barker* test. Unfortunately, the lower federal courts have not attempted to grapple with this problem but instead have consistently given little weight to reasons for which the government should bear the burden. The *Barker* decision set the tone for this approach, and it will probably require a re-evaluation by the Supreme Court before any progress can be made in this area.

The *Barker* decision was extremely ambivalent with regard to the defendant's assertion of his right to a speedy trial. This

[122] 371 F. Supp. 1384 (E.D.N.Y. 1974).

has been reflected in the lower courts' subsequent decisions. There has been no clear distinction drawn between the demand for speedy trial and the desire for a speedy trial. The Court in *Barker* made this distinction vaguely, but it is difficult to tell how strongly the Court relied on it.

Perhaps the single area in which the lower federal courts are most deficient in their analyses of speedy trial questions is their misplaced emphasis on impairment of defense. Since *Barker*, the Supreme Court made clear in *Moore v. Arizona*[123] that impairment of defense was not a prerequisite to a deprivation of speedy trial. Furthermore, the Court long ago made clear that the right of speedy trial is primarily designed to protect against those forms of prejudice which do not result from impairment of defense.[124]

If the cases discussed in this Note demonstrate anything, it is that in general the lower federal courts will only follow the Supreme Court's lead in the development of the constitutional guarantee of speedy trial. Thus, in order for the right to develop further, the Supreme Court must set the pace and issue future decisions which cast light on its decision in *Barker*.

ROBERT L. HARTLEY, JR.

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[123]414 U.S. 25 (1973).

[124]See text accompanying note 120 *supra*.

Recent Development

Labor Law—SUCCESSORSHIP—Successor employer held to have no duty to arbitrate its obligations to seller's former employees when no substantial continuity in work force exists.—*Howard Johnson Co. v. Detroit Local Joint Executive Board,* 94 S. Ct. 2236 (1974).

In a recent decision, *Howard Johnson Co. v. Detroit Local Joint Executive Board,*[1] the United States Supreme Court was again faced with the problem of defining the legal obligations of a "successor" employer to the employees of his predecessor. The Court held that, where there was no substantial continuity of identity in the work force hired by the buyer with that of the seller and where there was no express or implied assumption of the agreement to arbitrate, the buyer was not obligated to arbitrate the extent of its obligations to the seller's employees.[2]

In *Howard Johnson,* the Grissom family, who were owners of a motel and adjacent restaurant, entered into collective bargaining agreements with the two unions representing their employees. Both agreements contained arbitration provisions and provided that the agreements would be binding on the employer's successors, purchasers, or lessees.[3] The Grissoms then sold the personal property used in their business to Howard Johnson but retained ownership of the real property, which was leased to the purchaser. Prior to consummation of the sale, Howard Johnson explicitly refused to assume any obligations from the labor agreements between the seller and the unions.[4] To begin its operations, the buyer hired forty-five employees, nine of whom had been employed by the Grissoms.[5]

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[1]94 S. Ct. 2236 (1974).

[2]*Id.* at 2244.

[3]*Id.* at 2238.

[4]Howard Johnson sent the Grissoms a letter, which they later acknowledged, stating in part that "[i]t was understood and agreed that the Purchaser . . . would not recognize and assume any labor agreements between the Sellers . . . and any labor organizations," and that it was agreed that "the Purchaser does not assume any obligations or liabilities of the Sellers resulting from any labor agreements." *Id.*

[5]The Grissoms had a total of fifty-three employees. Howard Johnson started operations with thirty-three restaurant employees and twelve motor lodge employees. Of these only nine of the restaurant employees had previously been employed by the Grissoms. *Id.*

The union filed an action in a Michigan state court. The action, based on section 301 of the Labor Management Relations Act[6] (L.M.R.A.) which in subdivision (a) authorizes suits for violation of collective bargaining contracts,[7] was subsequently removed to the United States District Court for the Eastern District of Michigan. The union sought an order compelling both the seller and the purchaser to arbitrate the extent of their obligations to the seller's employees under the bargaining agreements.[8] The district court so ordered[9] and the Sixth Circuit Court of Appeals affirmed.[10] On certiorari, the United States Supreme Court reversed.[11] Justice Marshall delivered the eight to one opinion of the Court and Justice Douglas filed a dissenting opinion.[12] The Court held that since Howard Johnson's work force bore no substantial continuity of identity with that of the Grissoms and since Howard Johnson had not expressly or impliedly assumed the agreement to arbitrate, Howard Johnson was not compelled to arbitrate the extent of its obligations to the former Grissom employees.[13]

In an earlier successorship case, *John Wiley & Sons, Inc. v. Livingston*,[14] the Supreme Court found that a duty to arbitrate continued when there was both relevant similarity and continuity of operation bridging the change of ownership. These factors were evidenced by the wholesale transfer of all employees of the disappearing corporation to the plant of the surviving corporation.[15] The Court held that all of the rights covered by the collective bargaining agreement of the employees of the disappear-

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[6]29 U.S.C. § 185(a) (1970).

[7]94 S. Ct. at 2238-39.

[8]The sellers admitted their obligation to arbitrate under the terms of the collective bargaining agreements. *Id.* at 2239.

[9]The district court denied the union's motion for a preliminary injunction which would require Howard Johnson to hire all of the former Grissom employees, however, and granted a stay of its arbitration order pending appeal. Civil No. 38,654 (E.D. Mich., August 22, 1972).

[10]Detroit Local Joint Executive Bd. v. Howard Johnson Co., 482 F.2d 489 (6th Cir. 1973).

[11]94 S. Ct. at 2239.

[12]*Id.* at 2244.

[13]*Id.*

[14]376 U.S. 543 (1964).

[15]*Id.* at 551. The Court took note of the fact that the union made its position known to Wiley well before the merger. The union did not assert any bargaining rights independent of the Interscience agreement. The union sought to arbitrate claims based on that agreement, not to negotiate a new agreement.

ing corporation were not automatically terminated by the fact of the corporate merger.[16]

In its more recent decision in *NLRB v. Burns International Security Services, Inc.*,[17] the Court held that a successor employer may be required to recognize and bargain with the union when a majority of the employees hired by the successor were previously represented by a recently certified union.[18] However, the Court also held that the new employer, who had not agreed to assume the substantive terms of the collective bargaining agreement negotiated by its predecessor, was not bound by those terms.[19] In *Howard Johnson,* the Court neither reconciled nor overturned *Wiley* and *Burns* but, instead, relied on both of them in reaching its decision.

Since the lower courts distinguished *Wiley* from *Burns,* it is necessary to consider the fundamentals of each of these cases in order to understand the holding of the Supreme Court in *Howard Johnson. Wiley* was an action to compel arbitration brought by the union against the successor employer under section 301 of the L.M.R.A.[20] Interscience Publishers, Inc., which had a collective bargaining contract containing no successorship clause, merged with John Wiley & Sons, Inc., and Interscience ceased to exist as a separate entity.[21] The merger was subject to a state law which provided that claims against a corporation were not extinguished by a consolidation.[22] Wiley retained all of the predecessor's employees.[23] The union claimed it continued to represent those Interscience employees taken over by Wiley and, therefore, Wiley was obligated to recognize certain employee rights which had "vested" under the Interscience collective bargaining contract.[24] Wiley's

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[16]*Id.* at 548.

[17]406 U.S. 272 (1972).

[18]*Id.* at 281.

[19]*Id.* at 284.

[20]29 U.S.C. § 185 (1970). This section authorizes suit for violation of labor contracts. Section 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[21]376 U.S. at 544-45.

[22]*Id.* at 547-48.

[23]*Id.* at 545. Of the eighty Interscience employees at the time of the merger, forty were represented by the union.

[24]The union contract expired on January 31, 1962. Interscience and Wiley merged on October 2, 1961. The issues which the union sought to arbitrate were:

position was that it should not be compelled to arbitrate since it was not a signatory to the bargaining agreement upon which the union's claim to arbitration depended.[25]

The Supreme Court ordered Wiley to arbitrate with the union.[26] In its reasoning, the Court emphasized the central role of arbitration in national labor policy[27] and the need to afford some protection to employees during the transition from one employer to another.[28] Negotiations leading to a change in corporate ownership do not usually concern the well-being of the employees, and the Court felt that the transition from one corporation to another would be eased if employee claims were resolved by arbitration rather than by "the relative strength . . . of the contending forces."[29] The Court stated that an ordinary contract, which would not bind an unconsenting successor, differed from a collective bargaining agreement, which is a "generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate."[30] A collective bargaining contract is not the simple product of a

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(a) Whether the seniority rights built up by the Interscience employees must be accorded to said employees now and after January 30, 1962.

(b) Whether, as part of the wage structure of the employees, the Company is under an obligation to continue to make contributions to District 65 Security Plan and District 65 Security Plan Pension Fund now and after January 30, 1962.

(c) Whether the job security and grievance provisions of the contract between the parties shall continue in full force and effect.

(d) Whether the Company must obligate itself to continue liable now and after January 30, 1962 as to severance pay under the contract.

(e) Whether the Company must obligate itself to continue liable now and after January 30, 1962 for vacation pay under the contract.

Id. at 544-45, 552.

[25]*Id.* at 548.

[26]The Court held:

[T]he disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all of the rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.

Id.

[27]United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[28]376 U.S. at 549.

[29]*Id.*, *quoting from* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

[30]376 U.S. at 550, *quoting from* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960).

consensual relationship. Since Wiley's predecessor, Interscience, was a party to the collective bargaining contract and there was found to be a substantial continuity of identity in the business enterprise after the change in ownership, the duty to arbitrate was not something imposed from without, but rather was to be found in the particular bargaining agreement and in the acts of the parties.[31]

Burns was an unfair labor practice action. Upon acceptance of its contract bid, Burns replaced the Wackenhut Corporation, which had provided plant protection services at the Lockheed Aircraft Service Company.[32] Wackenhut had a bargaining agreement with the United Plant Guard Workers of America (UPG), which had been recently certified by the NLRB as the exclusive bargaining representative of Wackenhut's employees.[33] Before it replaced Wackenhut, Burns knew that Wackenhut's guards had a collective bargaining contract with the UPG, but Burns did not agree to be bound by the contract.[34] When Burns took over, it hired forty-two guards, twenty-seven of whom had been employed by Wackenhut. Burns subsequently refused to bargain with the UPG.[35]

The UPG then filed unfair labor practice charges, claiming that Burns had violated sections 8(a)(2) and 8(a)(1)[36] by unlawfully recognizing the American Federation of Guards, a rival of the UPG, and that Burns had violated sections 8(a)(1) and 8(a)(5)[37] by failing to recognize and bargain with the UPG and by refusing to honor the collective bargaining agreement negotiated by Wackenhut and the UPG.[38] Burns did not challenge the unlawful assistance finding but did challenge the appropriateness

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[31]376 U.S. at 550-51.

[32]Burns did not acquire any of Wackenhut's assets. Burns competed with Wackenhut for the contract to provide plant guards for Lockheed. 406 U.S. at 275.

[33]*Id.* at 274.

[34]*Id.* at 275.

[35]*Id.* Burns issued cards for the American Federation of Guards to the twenty-seven guards hired from Wackenhut.

[36]29 U.S.C. § 158(a) (1970) provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

[37]29 U.S.C. § 158(a)(5) (1970) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees."

[38]406 U.S. at 276.

of the bargaining unit and denied the obligations to bargain and to observe the collective bargaining agreement.[39] Burns claimed that the single Lockheed facility was not an appropriate bargaining unit.[40] The trial examiner found that the Lockheed bargaining unit was appropriate[41] and the Supreme Court refused to review this determination.[42]

The Supreme Court held that when a bargaining unit remained the same and a majority of the employees hired by the new employer were represented by a recently certified bargaining agent, the new employer could be ordered to bargain with the union.[43] In reaching its decision, the Court considered the fact that Burns knew of the recent certification of the UPG and of the existence of the collective bargaining contract.[44] Since Burns hired a majority of its predecessor's employees, who were already represented by a union certified as their bargaining agent, Burns was bound to bargain with the union under section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."[45]

However, the Court relied on *H.K. Porter Co. v. NLRB*[46] in holding that the new employer was not bound by the substantive provisions of a collective bargaining contract negotiated by its predecessor but not agreed to or assumed by it.[47] In *Porter*, the Court said that

> allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure

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[39] *Id.*

[40] *Id.* at 298. Burns made a practice of transferring employees from one jobsite to another. For administrative purposes Wackenhut treated each location as a separate unit, but Burns treated large numbers of them together.

[41] William J. Burns Int'l Detective Agency, Inc., 182 NLRB 348 (1970). This point was affirmed by William J. Burns Int'l Detective Agency, Inc. v. NLRB, 441 F.2d 911 (2d Cir. 1971).

[42] 406 U.S. at 277-78.

[43] *Id.* at 281.

[44] *Id.* at 278. For a general discussion of the reasoning in *Burns*, see 86 HARV. L. REV. 247 (1972).

[45] 406 U.S. at 277-78, *citing* 29 U.S.C. § 158(a)(5) (1970).

[46] 397 U.S. 99 (1970).

[47] 406 U.S. at 284. The Court also held that Burns did not commit an unfair labor practice by unilaterally changing existing terms and conditions of employment, because Burns had no previous relationship to the unit and, therefore, had no outstanding terms and conditions of employment. *Id.* at 294.

> alone, without any official compulsion over the actual terms of the contract.[48]

Serious inequities might result if either the union or the new employer were held to the substantive terms of the old bargaining agreement. Each side should be able to negotiate freely in light of current economic realities for terms it considers appropriate.[49]

In *Howard Johnson,* the courts below found *Wiley* controlling on the basis that *Wiley* and *Howard Johnson* both involved a section 301 suit to compel arbitration, whereas *Burns* involved an unfair labor practice action.[50] One of the most significant points the Supreme Court made in *Howard Johnson* was that the basic policies controlling in an unfair labor practice context may not be disregarded in a section 301 arbitration context.[51] In so holding, the Court emphasized its decision in *Textile Workers Union v. Lincoln Mills,*[52] which directed the federal courts to develop a federal common law "fashion[ed] from the policy of our national labor laws."[53] The union in *Howard Johnson* had tried to circumvent the policy of the NLRB holding in *Burns* by bringing a section 301 arbitration suit in federal court. The Supreme Court in *Howard Johnson* emphasized that the rights of the parties in a successorship context should not depend on the forum in which the suit is heard.[54]

The Court, in *Howard Johnson,* emphasized the necessity of using a case-by-case approach in developing the federal common law under section 301, since there are many different factual circumstances and legal contexts in which the successorship problem can arise. The Supreme Court held that the lower court decisions were an unwarranted extension of *Wiley.* The Supreme Court stressed several facts in reaching its decision in *Howard Johnson.* In *Wiley,* the former employer disappeared by merger and the only remedy available to the union was against Wiley, the successor.[55] In *Howard Johnson,* the initial employer survived as a legal entity, and, therefore, the union had a realistic remedy

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[48] 397 U.S. at 108.

[49] 406 U.S. at 287.

[50] 94 S. Ct. at 2240.

[51] *Id.*

[52] 353 U.S. 448 (1957).

[53] 94 S. Ct. at 2240, *quoting from* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957).

[54] 94 S. Ct. at 2240.

[55] *Id.* at 2241. *See also* Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), which held that there is usually no need for distinguishing among mergers, consolidations, or purchases of assets in analyzing successorship problems.

against the former employer.[56] Wiley hired all of its predecessor's employees whereas Howard Johnson hired an independent work force.[57] Furthermore, the union in *Wiley* sought to protect the benefits that employees were to receive in connection with their employment.[58] The union in *Howard Johnson* sought arbitration on behalf of the employees *not* hired by Howard Johnson in order to force Howard Johnson to hire all of its predecessor's employees.[59] The Court found that what the union sought in *Howard Johnson* was in conflict with the basic principles of *Burns*.[60] Nothing in the federal labor laws requires a successor employer to hire all of the employees of his predecessor.[61] A successor employer should be free to make changes in the composition of the labor force.[62] *Burns* established that Howard Johnson was not compelled to hire any of Grissom's employees if it so chose.[63]

Because of its emphasis on examining the facts in a case-by-case approach, the Court did not set forth a comprehensive test for successorship. However, the Court did establish what appears to be at least one of the essential ingredients in a test for successorship. In *Wiley*, the Court held that arbitration could not be compelled unless there was "substantial continuity of identity in the business enterprise" before and after a change in ownership, because otherwise the duty to arbitrate would be "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved."[64] In *Howard Johnson*, the Court found that "[t]his continuity of identity in the business enterprise necessarily includes, we think, a *substantial continuity in the identity of the work force* across the change in ownership."[65] In similar suits the lower courts have also emphasized whether or not a successor

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[56]94 S. Ct. at 2241. The Court pointed out that the Grissom corporations were viable entities with substantial assets from which a judgment could be satisfied.

[57]*Id.* See note 7 *supra* for a discussion of the Howard Johnson employee breakdown.

[58]See note 28 *supra*.

[59]94 S. Ct. at 2242.

[60]*Id.* at 2243, *citing* NLRB v. Burns Int'l Security Serv., Inc. 406 U.S. 272, 280 n.5 (1972).

[61]NLRB v. Burns Int'l Security Serv., Inc. 406 U.S. 272, 280 n.5 (1972). *See also* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 n.6 (1973).

[62]406 U.S. at 287-88.

[63]94 S. Ct. at 2243. However, discriminatory hiring could be a violation of section 8(a)(3). See notes 74 and 75 *infra* & accompanying text.

[64]94 S. Ct. at 2244, *quoting from* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964).

[65]94 S. Ct. at 2244 (emphasis added).

hires a majority of the predecessor's employees in determining the obligations of the successor in section 301 arbitration suits.[66]

In his dissenting opinion, Justice Douglas confronted the problem of what the test for successorship is now. He indicated his belief that the majority of the Court has made "the number of prior employees retained by the successor the sole determinative factor" in ascertaining the existence of successorship.[67] While the majority opinion utilized the concept of "a substantial continuity in the identity of the work force across the change in ownership"[68] in deciding whether successorship exists, the number of retained employees is clearly not the only factor considered. The Court also considered the method by which Howard Johnson took over the business, the continued existence of the previous employer, Grissom, whether there was "substantial continuity of identity in the business enterprise,"[69] whether the new employer expressly or impliedly assumed the predecessor's collective bargaining contract, and the purpose for which the union sought arbitration.[70] Justice Douglas apparently felt that the Court would use the number of previous employees hired by the new employer as the "sole determinative factor"[71] in future successorship cases.

Justice Douglas also expressed concern that using the number of retained employees as the test for successorship will leave unprotected the rights of employees of the prior employer.[72] However, refusal to hire the former employer's employees to avoid successorship would amount to a discriminatory refusal to hire those persons because of their membership in a labor organization,[73] which is a violation of section 8(a)(3) of the L.M.R.A.[74]

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[66]*See* Printing Specialties Union v. Pride Papers Aaronson Bros. Paper Corp., 445 F.2d 361 (2d Cir. 1971); International Ass'n of Machinists v. NLRB, 414 F.2d 1135 (D.C. Cir. 1969); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964); Boeing Corp. v. International Ass'n of Machinists, 351 F. Supp. 813 (M.D. Fla. 1972); Owens Illinois, Inc. v. District 65 Retail, Wholesale, & Department Store Union, 276 F. Supp. 740 (S.D.N.Y. 1967); Local Joint Executive Bd. v. Joden, Inc., 276 F. Supp. 390 (D. Mass. 1966).

[67]94 S. Ct. at 2246 (Douglas, J., dissenting).

[68]*Id.* at 2244.

[69]*Id.* at 2241-42.

[70]*Id.* at 2239-44.

[71]*Id.* at 2246 (Douglas, J., dissenting).

[72]*Id.*

[73]Brief for Appellant at 61, Howard Johnson Co. v. Detroit Local Joint Executive Bd., 94 S. Ct. 2236 (1974).

[74]29 U.S.C. § 158(a) (1970) provides in pertinent part: "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Hence, any employees so discriminated against have a remedy under the provisions of the Labor Management Relations Act.[75]

In its reasoning in *Howard Johnson,* the Court relied on both *Wiley* and *Burns* but refused to resolve whether there was any irreconcilable conflict between *Wiley* and *Burns.*[76] *Wiley* emphasized the protection needed by employees against sudden changes in terms and conditions of employment in a successorship situation.[77] *Burns* recognized the new employer's right to hire its own labor force to operate the business, and its right not to be held to the substantive terms of the old bargaining agreement even if it did hire a majority of the predecessor's employees.[78] However, in *Howard Johnson,* the Court said it was attempting to balance *Wiley* and *Burns* when it held that when there was no substantial continuity of identity in the work force and no express or implied assumption of the agreement to arbitrate, Howard Johnson was not compelled to arbitrate the extent of its obligations to the former Grissom employees.[79]

One important question which the *Howard Johnson* Court did not explore was what policy is to control in a situation in which the successor employer takes over a business when there *is* a substantial continuity of identity in the work force hired by the new employer with that of the previous employer. In *Howard Johnson,* the Court *distinguished Wiley* but did not overrule it.[80] If *Wiley* controls our hypothetical situation, the successor might be required to arbitrate the extent of its obligations to the predecessor's employees. If *Burns* controls, the new employer might be required to bargain with the union but would not be held to the substantive terms of the collective bargaining contract. There appears to be a substantial conflict between *Burns* and *Wiley* which does need to be reconciled.

Another problem which needs to be explored is that of the meaning of the successorship clause in a collective bargaining agreement. The collective bargaining agreements which the unions had with the Grissoms provided that the agreements would be binding upon the employer's "successors, assigns, purchasers, lessees or transferees."[81] In spite of this provision, the Court found that Howard Johnson was not bound under the bargain-

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[75]An order of reinstatement, substantial back pay liability, and an order to bargain could result.

[76]94 S. Ct. at 2240.

[77]376 U.S. at 549.

[78]406 U.S. at 280-81.

[79]94 S. Ct. at 2244.

[80]*Id.* at 2237.

[81]*Id.* at 2238.

ing agreement.[82] Grissom agreed to arbitrate the extent of its liability to its former employees. The Court suggested that this arbitration would presumably explore whether Grissom had breached the successorship provisions of the contract, and, if so, what the remedy for that breach might be.[83]

Howard Johnson demonstrates the Court's cautious case-by-case approach to developing the common law of successorship and its reluctance to set forth a definitive test for successorship. It also illustrates the Court's determination to prevent forum shopping in a successorship suit by holding that basic policies controlling an unfair labor practice action before the NLRB may not be disregarded in a federal court suit to compel arbitration.

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[82] *Id.* at 2243.

[83] *Id. See id.* at 2241 n.3. The Court pointed out that the union might have had another remedy available to it prior to sale. The union might have moved to enjoin the Grissoms from completing the sale to Howard Johnson on the grounds that the sale would be a breach of the successorship clauses in the collective bargaining agreements.

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